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No. _____

In The

Supreme Court of the United States

CITY OF TAMPA, FLORIDA,

Petitioner,

v.

VOYEUR DORM, L.C., ENTERTAINMENT NETWORK, INC., AUTUMN DAWN MARENGER AND 2D&H, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES D. PALERMO, City Attorney
GINA K. GRIMES
Chief Assistant City Attorney
JERRY M. GEWIRTZ
Assistant City Attorney
Counsel of Record
Fifth Floor, City Hall
315 E. Kennedy Blvd.
Tampa, Florida 33602
(813) 274-8996

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the well established case law of the United States Supreme Court – which allows municipalities to keep adult entertainment establishments out of residential neighborhoods – is applicable to the staging and filming of adult entertainment on a residential premises where the adult entertainment is commercially transmitted over the internet to paying subscribers who may view the adult entertainment without physically attending the residential premises wherein the adult entertainment is being staged and filmed; and where there is evidence in the record of adverse secondary effects in the residential neighborhood from the adult entertainment being staged and filmed at the residential premises.

2. Whether a municipality's definition of an adult entertainment establishment, which does not expressly require that patrons view the adult entertainment from the location where the adult entertainment is being performed, may be judicially interpreted to impose a requirement that patrons view the adult entertainment from the location where the adult entertainment is being staged and filmed.

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CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit that gives rise to this Petition, which was filed on September 21, 2001, is reproduced at Appendix A to this Petition. It is reported at 265 F.3d 1232 (11th Cir. 2001).

The Order denying the City's Petition for Rehearing En Banc, which was filed on November 15, 2001, is reproduced at Appendix C to this Petition.

The Order of the District Court granting the City's Motion for Final Summary Judgment, which was filed on November 6, 2000, is reproduced at Appendix B to this Petition. It is reported at 121 F.Supp.2d 1373 (M.D. Fla. 2000).

JURISDICTION

On November 6, 2000 the United States District Court for the Middle District of Florida entered an Order granting the Motion of the City of Tampa ("City") for Final Summary Judgment.

On September 21, 2001 the United States Court of Appeals for the Eleventh Circuit issued its decision reversing the District Court's Order granting final summary judgment in favor of the City.

On October 9, 2001 the City filed a Petition for Rehearing En Banc with the Eleventh Circuit which was denied on November 15, 2001.

The within Petition for Writ of Certiorari is timely filed within 90 days of the date of the denial of the Petition for Rehearing En Banc in accordance with Rule 13.3 of the Rules of this Court.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The relevant provisions from § 27-523 of the Tampa City Code, including the definitions of "Adult Entertainment Establishment," "Specified Anatomical Areas," and "Specified Sexual Activities," are set forth below.

> *Adult entertainment establishment:* Any premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as

defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances, either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section.

Specified anatomical areas:

(1) Less than completely and opaquely covered:

a. Human genitals or pubic region;

b. Buttocks;

c. Female breasts below a point immediately above the top of the areola;

(2) Human male genitals in a discernably turgid state, even if completely and opaquely covered.

Specified sexual activities:

(1) Human genitals in a state of sexual stimulation or arousal;

(2) Acts of human masturbation, sexual intercourse or sodomy, whether actual or simulated;

(3) Fondling or other erotic touching of human genitals, pubic region, buttocks or female breasts.

STATEMENT OF THE CASE

On January 29, 1999 Plaintiffs' counsel, Mark Dolan, sent a letter to the City's Zoning Coordinator requesting her interpretation of the City Code as it applied to the activities occurring at 2312 Farwell Drive, Tampa, Florida ("the premises").

On February 12, 1999 the City's Zoning Coordinator, Gloria Moreda, responded to the aforesaid letter and stated in relevant part:

> The following generally describes the activities occurring on the property:
>
> 1. 5 unrelated women are residing on the premise.
> 2. 30 internet cameras are located in various rooms in the house; such as the bedrooms, bathrooms, living rooms, shower, & kitchen.
> 3. For a fee, internet viewers are able to monitor the activities in the different rooms.
> 4. The web page address is http://www.voyeurdorm.com/
> 5. The web page shows various scenes from the house, including a woman with an exposed buttocks. Statements on the page describe activities that can be viewed such as 'The Girls, of Voyeur Dorm are fresh, naturally erotic and as young as 18. Catch them in the most intimate acts of youthful indiscretion'.
>
> The web page can be found by going to Yahoo! and entering 'Voyeurdorm' on the search. The

name of the web site is, itself, advertising the adult nature of the entertainment. Voyeur is defined in the *American Heritage Dictionary*, Second College Edition as 'A person who derives sexual gratification from observing the sex organs or sexual acts of others, especially from a secret vantage point'.

It is my determination that the use occurring at 2312 W. Farwell Dr., as described in your letter, is an adult use. Section 27-523 defines adult entertainment as:

> Any premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section.

> Please be aware that the property is zoned RS-60 Residential Single Family and an adult use business is not a permitted use. You should advise your client to cease operation at that location.

Thereafter, on or about April 12, 1999, Dan and Sharon Gold Marshlack appealed the Zoning Coordinator's decision to the City's Variance Review Board and on or about July 13, 1999 the Variance Review Board voted unanimously to uphold the Zoning Coordinator's determination in this matter that the use occurring at the premises is an adult use.

Thereafter, on or about July 18, 1999, Dan and Sharon Gold Marshlack filed an appeal from the decision of the Variance Review Board to the City Council; and, on or about August 26, 1999, an appellate hearing was held before Tampa City Council in this matter. At that hearing, Dan and Sharon Gold Marshlack were once again represented by attorney Mark Dolan. Plaintiffs' counsel did not dispute, at the hearing, that there is a fee charged for viewing the women of the Voyeur Dorm; that the women are in fact disrobed; that they are part of a business enterprise; that Plaintiffs' counsel had requested an occupational license; and that these women were being paid. At the conclusion of the hearing, City Council voted unanimously to affirm the decision of the Variance Review Board which had upheld the determination of the Zoning Coordinator.

Thereafter, on or about September 24, 1999, the within action was filed by Plaintiffs Voyeur Dorm, L.C., Entertainment Network, Inc., Autumn Dawn Marenger,

and Dan and Sharon Gold Marshlack ("the Plaintiffs")[1] in the United States District Court for the Middle District of Florida.

During the course of discovery, it was established that approximately 25 to 30 different women have been employed at the premises; and that the women employed at the premises have appeared on the internet based web site voyeurdorm.com which is transmitted to subscribers 24 hours a day, seven days a week.

During the course of discovery it was further established that Plaintiff Autumn Marenger, and other women employed at the premises, entered into an Employment Agreement[2] with Plaintiff Voyeur Dorm, L.C. which provides, *inter alia*, that:

> (a) In consideration of employee allowing Voyeur Dorm to commercially photograph and broadcast the images and likeness of employee, live over the internet 24 hours a day, 7 days a week, Voyeur Dorm agreed to provide benefits to employee, as set forth in the Agreement, including providing compensation to employee and allowing employee to occupy and use a furnished bedroom and all common areas at the premises. (See App. 32; and paragraphs 2,

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[1] Subsequent to the filing of the lawsuit, 2 D&H, Inc. was substituted as a party Plaintiff for Dan and Sharon Gold Marshlack.

[2] A copy of the Employment Agreement is reproduced at Appendix D.

11 and 21 of the Employment Agreement reproduced at Appendix "D".)

(b) Employee acknowledged that the premises are, in addition to being the residence of employee, a stage and filming location for commercial internet broadcasting of the day to day activities of employee and other fellow employees 24 hours per day, 7 days a week. (See paragraph 9 of the Employment Agreement reproduced at Appendix "D".)

(c) Employee was prohibited from altering, moving or in any way interfering with the location or operation of the cameras at the premises. (See paragraph 10A of the Employment Agreement reproduced at Appendix "D".)

(d) Employee agreed to devote 8 hours per day, 6 days per week, to on-camera activities including, but not limited to, chatting, tanning, swimming, dressing, theme parties, special events, personal grooming and ablutions.[3] (See paragraph 22 of the Employment Agreement reproduced at Appendix "D".)

(e) Employee acknowledged that she had no reasonable expectation of privacy while on the premises and agreed to having her

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[3] The word "ablution" is defined by *Webster's Collegiate Dictionary*, Tenth Edition, to mean "the washing of one's body or part of it;" and "the act or action of bathing." The employees that were deposed also testified that they understood the word "ablution" to mean bathing or showering.

images and likeness commercially broadcast by Voyeur Dorm live over the internet 24 hours a day, seven days a week. (See paragraph 27 of the Employment Agreement reproduced at Appendix "D".)

(f) Employee agreed that she was not a tenant and waived any rights that she may have as a residential tenant. (See paragraph 28 of the Employment Agreement reproduced at Appendix "D".)

(g) Employee agreed that she could be terminated at will whereupon she would be required to immediately remove her personal property and leave the premises. (See paragraph 1 of the Employment Agreement reproduced at Appendix "D".)

During the course of discovery it was also established that the women employed at the premises, while performing their job responsibilities and appearing on voyeurdorm.com, displayed their specified anatomical areas including their uncovered breasts, uncovered buttocks and/or uncovered pubic region to the cameras; and those activities were intended to be displayed to the subscribers of voyeurdorm.com. Indeed, during the course of performing numerous activities that were required to be performed on camera pursuant to the Employment Agreement – including showering, swimming, tanning, changing clothes, chatting with subscribers and participating in theme parties and special events – the women employed at the premises exposed their uncovered breasts, uncovered buttocks and/or

uncovered pubic region to the cameras and those activities were intended to be displayed to the subscribers of voyeurdorm.com.

During the course of discovery, it was further established that some of the women employed at the premises also engaged in specified sexual activities at the premises and those specified sexual activities were displayed to the subscribers. In that regard, the discovery reflected that some of the women employed at the premises engaged in masturbation at the premises on camera and that said activity of masturbation was intended to be displayed to the subscribers of voyeurdorm.com; and that some of the women employed at the premises also engaged in oral sex at the premises on camera and that said activity of oral sex was displayed on voyeurdorm.com.

The discovery further revealed that the women employed at the premises are compensated for their services and receive a salary of approximately $400-$700 per week, plus occasional bonuses, plus free room and board, plus health insurance, plus dental insurance and free local phone service; that the subscribers to voyeurdorm.com pay a subscription fee of $34.95 a month to watch the women employed at the premises and subscribers pay a further fee of $16.00 per month if they wish to chat with the women employed at the premises; and that Voyeur Dorm generated subscriptions and sales in the amount of $3,166,551.35 from August, 1998 to June, 2001.

Finally, discovery further revealed that there were at least some individuals that physically visited the premises that had access to the voyeurdorm.com web site. In

that regard, the deposition testimony of Plaintiffs' employees reflects that one or more friends of the employees, who either paid a membership fee or were given a borrowed password, visited the premises. In addition, media representatives that visited the premises were given passwords to voyeurdorm.com.

On November 6, 2000 the District Court entered an Order granting the City's Motion for Final Summary Judgment. In reaching that conclusion the District Court found, in examining the undisputed facts and in applying the applicable law, that the City Code does not permit adult uses in residential districts; that the activities occurring at the premises constitute an adult use; that there is no language under the City Code that expressly states a requirement that the members of the public paying consideration be on the premises to view the adult entertainment from the location where the adult entertainment is being staged and filmed; that the Court must apply the plain and unambiguous language of the City Code and may not read language into the City Code which does not appear on the face of the City Code; that, as a matter of zoning law, the City is entitled to protect and improve the quality of its residential neighborhoods; and that, under well established law, it is not necessary for the City to demonstrate that it had experienced actual adverse secondary effects from the adult use activities at the premises.

On September 21, 2001 the Eleventh Circuit reversed the District Court's Order granting Final Summary Judgment in favor of the City. In reaching that conclusion the Eleventh Circuit found that, because members of the public did not physically attend the premises where the

adult entertainment was being staged and filmed, the premises did not fall within the purview of Tampa's zoning ordinance; that the case law relied upon by the City and the District Court concerned adult entertainment in which customers physically attend the premises wherein the entertainment is performed; and that the District Court misapplied the Tampa City Code because it erroneously found that the Voyeur Dorm offered adult entertainment to the public at the premises.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT WHICH HOLD THAT A MUNICIPALITY MAY KEEP ADULT ENTERTAINMENT ESTABLISHMENTS OUT OF RESIDENTIAL NEIGHBORHOODS.

The law is well established that municipalities may regulate the location of adult uses and, indeed, the Supreme Court has upheld zoning ordinances prohibiting adult businesses in residential neighborhoods. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (Supreme Court upheld city's zoning ordinance, which prohibited adult uses from locating within 1,000 feet of residentially zoned property, and found that the city's interest in attempting to preserve the quality of urban life must be accorded high respect); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (Supreme Court upheld validity of zoning ordinance, prohibiting the operation of an adult establishment within 500 feet of a residential area, and found that the city's interest in attempting to

preserve the quality of its neighborhoods must be accorded high respect).

The law is also well established that a municipality need not even conduct new studies on a case by case basis to demonstrate the problem of secondary effects associated with an adult entertainment establishment. In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), the Supreme Court expressly held that:

> [T]he city need not 'conduct new studies or produce evidence independent of that already generated by other cities' to demonstrate the problem of secondary effects . . . And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. *See Renton v. Playtime Theatres, Inc., supra* at 51-52, 106 S.Ct. 925 (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient).

529 U.S. at 296-297.[4]

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[4] In the case *sub judice*, the City – consistent with the Supreme Court's decision in *Pap's* – reasonably relied on the evidentiary foundation set forth in *American Mini Theatres*. Indeed, in *Specialty Malls of Tampa v. City of Tampa*, 916 F.Supp. 1222, 1230 (M.D. Fla. 1996), *aff'd*, 109 F.3d 770 (11th Cir. 1997), the district court specifically identified the Supreme Court decision in *American Mini Theatres*, and Detroit's adult use ordinance which was the subject of the *American Mini Theatres* case, as being two of the seven predicate documents upon which the City of Tampa relied to establish secondary effects caused by adult uses. These documents, moreover, were filed in support of

It should further be noted that in *Pap's* that the Court expressly stated that "the 'invocation of academic studies said to indicate' that the threatened harms are not real is insufficient to cast doubt on the experience of the local government." 529 U.S. at 300 (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 394 (2000)). The Supreme Court, moreover, expressly rejected Justice Souter's partial dissent which would have required an empirical analysis to determine whether the threatened harm was real. Indeed, the Supreme Court stated:

> Justice SOUTER next hypothesizes that . . . since the question whether these secondary effects occur is 'amenable to empirical treatment,' we should . . . require such an empirical analysis. . . . In *Nixon*, however, *we flatly rejected that idea.*

529 U.S. at 300 (emphasis supplied).

Finally, in *Pap's*, the Court made clear that "the government should have sufficient leeway to justify . . . a law based on secondary effects." *Id.* at 298 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).[5]

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the City's Motion for Final Summary Judgment in the case *sub judice*. Finally, the District Court's Order of November 6, 2000 also found that the "City Code is based upon a proper predicate and is justified based on secondary effects. . . . " (See App. 27.)

[5] As the Court pointed out in *Pap's*, the *O'Brien* decision "did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards." 529 U.S. at 298. *See also Federal Communications Commission v. Beach Communications, Inc.*, 508 U.S. 307 (1993) where the Supreme Court held that "a legislative choice is not subject to courtroom fact-finding and

The aforesaid case law is clearly binding and applicable in the case *sub judice*. Indeed, some of the adverse secondary effects which are associated with adult entertainment businesses in residential neighborhoods may be found in the record below which reflects, *inter alia*, the following: that there were complaints by neighbors concerning the activities at the premises; that there were concerns expressed by residents to a detective about parking, traffic and noise; that a former employee complained to the effect that the women at the Voyeur Dorm were "all being exploited" and "all encouraged to take their clothes off;" that there were numerous visits by the media to the premises including reporters and camera crews;[6] and there was an Incident Report prepared by the Tampa Police Department reflecting an alleged battery that occurred at the premises. Moreover, Plaintiffs' own criminologist testified at his deposition that there was an 11.2% increase in calls for service to the Tampa Police Department in the area of the premises after the Voyeur Dorm began its operation at the premises; and Plaintiffs' criminologist was unable to definitively rule out the

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may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315.

[6] Plaintiff Autumn Marenger testified that there were approximately 20 different occasions when the media visited the premises when she was present and that typically there was a reporter and a camera person present in connection with the visits by the media; and another former employee at the premises testified that she was interviewed at the premises approximately 30 times by the media.

possibility that the Voyeur Dorm caused the increase in calls for service to the Tampa Police Department.[7]

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[7] Notwithstanding the aforesaid evidence which is indicative of adverse secondary effects from the adult entertainment being staged and filmed at the residential premises, it is the Plaintiffs' position – based upon reports prepared by Plaintiffs' alleged experts – that there are no adverse secondary effects from the adult entertainment being staged and filmed at the premises. In that regard, to the extent that it were necessary to demonstrate adverse secondary effects on a case by case basis, a trial may be necessary to resolve any factual dispute between the parties as to whether there are adverse secondary effects in the residential neighborhood from the adult entertainment being staged and filmed on the residential premises. As set forth *supra*, however, the Supreme Court has held that a city need not conduct new studies on a case by case basis to demonstrate the problem of secondary effects associated with the presence of even one adult entertainment establishment in a given neighborhood. *Pap's*, 529 U.S. at 296-297. Similarly, in *Cafe 207, Inc. v. St. John's County*, 856 F.Supp. 641 (M.D. Fla. 1994), *aff'd per curiam*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996), where "Plaintiff vigorously argue[d] that a trial [was] necessary to explore and decide fact issues relating to . . . whether there are, in actuality, any adverse secondary effects of adult entertainment establishments," the court expressly rejected the plaintiff's argument. *Id.* at 644. The court stated in relevant part that "[e]vidence about secondary effects or, rather, the lack of them, is . . . clearly foreclosed." *Id.* at 645. Accordingly, the District Court in the case *sub judice* properly concluded that "Plaintiffs' expert reports regarding the secondary effects of the subject premises, or lack thereof, are irrelevant to this Court's analysis, and there is no merit to Plaintiffs' argument that there are no *actual* secondary effects from the activities at the premises." (See App. 22-23) (emphasis in original).

The decision by the Eleventh Circuit, which countenances adult entertainment being staged and filmed at a residential premises 24 hours a day, 7 days a week, clearly flies in the face of well established case law which allows municipalities to protect the quality of residential neighborhoods. Indeed, in *City of Renton*, the Supreme Court expressly held that in the context of zoning adult uses that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " 475 U.S. at 50 (quoting *American Mini Theatres*, 427 U.S. at 71). Moreover, the Supreme Court has held that "[T]he police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).[8]

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[8] The Supreme Court's decision in *Village of Belle Terre* has subsequently been cited with favor in numerous cases including *Farrell v. City of Miami*, 587 F.Supp. 413 (S.D. Fla. 1984), *aff'd*, 758 F.2d 658 (11th Cir. 1985) wherein the court upheld the validity of an ordinance limiting the commercial use of a residentially zoned property. In *Farrell*, the court made clear that an ordinance which seeks to protect residential neighborhoods by limiting commercial uses of a house has been recognized as a proper restriction on the use of residential property. The Supreme Court's decision in *Village of Belle Terre* has also been favorably quoted in *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1992), *cert. denied*, 511 U.S. 1018 (1994) wherein the Eleventh Circuit stated that the "Supreme Court has held restrictions may be imposed to protect 'family values, youth values and the blessings of quiet seclusion.' " 997 F.2d at 1375 (quoting *Village of Belle Terre*, 416 U.S. at 9).

Finally, it must be noted that the City is *not* regulating the content of speech or any other form of communication that is being disseminated over the internet; rather, the City is simply seeking to regulate the *location*[9] of an adult use business. This distinction has been recognized by the Supreme Court in a number of cases including *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) wherein the Supreme Court observed that "In *Renton*, we upheld a zoning ordinance that kept adult movie theatres *out of residential neighborhoods*. The ordinance was aimed, not at the content of the films . . . but rather at the 'secondary effects' . . . *'It is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive speech.'* " *Reno*, 521 U.S. at 867 (emphasis supplied) (quoting *Renton*, 475 U.S. at 49) (quoting *American Mini Theatres*, 427 U.S. at 71 n.34).

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[9] Plaintiffs may stage and film adult entertainment in other locations throughout the City that are properly zoned for adult entertainment. In that regard, adult uses are permitted in the CI, IG and IH districts within the City. (See App. 17 n.2.)

B. THE DECISION OF THE ELEVENTH CIRCUIT, WHICH READS LANGUAGE INTO THE CITY CODE'S DEFINITION OF AN ADULT ENTERTAINMENT ESTABLISHMENT TO REQUIRE THAT PATRONS VIEW THE ADULT ENTERTAINMENT FROM THE LOCATION WHERE THE ADULT ENTERTAINMENT IS BEING STAGED AND FILMED, IS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT.

As the District Court stated in its November 6, 2000 Order, "There is no language in the City Code that expressly states a requirement that the members of the public paying consideration be *on* the premises viewing the adult entertainment." (See App. 18) (emphasis in original).

The Eleventh Circuit itself appears to acknowledge in its opinion that a literal reading of § 27-523 of the City Code does not require that the paying public be on the premises. In that regard, the Eleventh Circuit states in its opinion that "the district court read Section 27-523 in a literal sense, finding no requirement that the paying public be *on the premises*. . . . " (See App. 10) (emphasis in original).

The City respectfully submits that given the literal language of § 27-523 of the City Code, which does not expressly require that patrons view the adult entertainment from the location where the adult entertainment is being staged and filmed, it is improper for the Eleventh Circuit to read language into the ordinance which does not appear on the face of the ordinance. In that regard,

the law is well established that the plain meaning of a statute or ordinance is the polestar of statutory construction. Indeed, in *Hughes Aircraft Company v. Jacobson*, 522 U.S. 432, 438 (1999), the Supreme Court unanimously held that "As in any case of statutory construction, our analysis begins with 'the language of the statute' . . . And where the statutory language provides a clear answer, it ends there as well."

Finally, even assuming arguendo that § 27-523 of the City Code were ambiguous and susceptible of two interpretations, the Supreme Court has held that an agency's interpretation of a statute "need only be reasonable to be entitled to deference." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988). In that regard, the District Court properly found that the Zoning Coordinator's determination was not clearly erroneous and that, as a matter of law, "an agency's interpretation of a statute that is charged with enforcing it is entitled to great weight and deference." (See App. 20.)

CONCLUSION

The questions presented herein are of exceptional importance and go to the very essence of this Court's jurisprudence permitting municipalities to regulate the location of adult entertainment businesses. In that regard, this Court has consistently shown deference to the efforts of municipalities to ameliorate the adverse secondary effects of adult businesses on neighborhoods through the use of the zoning power.

The questions presented herein are also of significance because of the advent of the internet and its use by the Plaintiffs to commercially transmit adult entertainment from a residential home, where the adult entertainment is being staged and filmed, to subscribers who pay a monthly fee to watch the adult entertainment. In that regard, the technological development of the internet – and the ability of patrons to view the adult entertainment through the internet without physically attending the residential premises wherein the adult entertainment is being staged and filmed – should not undermine, or make inapplicable, the well established case law of this Court which allows municipalities to keep adult entertainment establishments out of residential neighborhoods.

In conclusion, this case is of national significance and the failure of this Court to address the questions set forth herein may result in the proliferation of adult entertainment establishments – staging and filming adult entertainment 24 hours a day – in residential neighborhoods throughout the country and thereby creating adverse secondary effects in the residential neighborhoods where the adult entertainment is being staged and filmed.

Accordingly, it is respectfully requested that this Court grant the within Petition and resolve the vital questions which are the subject of the within Petition.

DATED: December 14, 2001

Respectfully submitted,

JAMES D. PALERMO, City Attorney
GINA K. GRIMES
Chief Assistant City Attorney
JERRY M. GEWIRTZ
Assistant City Attorney
Counsel of Record
Fifth Floor, City Hall
315 E. Kennedy Blvd.
Tampa, Florida 33602
(813) 274-8996

Attorneys for Petitioner

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-16346

D.C. Docket No. 99-02180-CV-T-24F

VOYEUR DORM, L.C., a Florida limited liability company, ENTERTAINMENT NETWORK, INC., a Florida corporation, et al.,

Plaintiffs-Appellants,

DAN MARSHLACK, SHARON GOLD MARSHLACK,

Plaintiffs,

versus

CITY OF TAMPA, FL, a Florida municipal corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(September 21, 2001)

Before TJOFLAT, DUBINA and DUHE*, Circuit Judges.

DUBINA, Circuit Judge:

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* Honorable John M. Duhe, Jr., U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

This appeal arises from Voyeur Dorm L.C.'s ("Voyeur Dorm") alleged violation of Tampa's City Code based on the district court's characterization of Voyeur Dorm as an adult entertainment facility. Because we conclude the district court misapplied Tampa's City Code because it erroneously found that Voyeur Dorm offered adult entertainment to the public at the residence in question, we reverse the judgment of the district court.

I. BACKGROUND

As alleged in its complaint, Voyeur Dorm is a Florida limited liability company that maintains offices and conducts its business in Hillsborough County, Florida. Voyeur Dorm operates an internet based web site that provides a 24 hour a day internet transmission portraying the lives of the residents of 2312 West Farwell Drive, Tampa, Florida. Throughout its existence, Voyeur Dorm has employed 25 to 30 different women, most of whom entered into a contract that specifies, among other things, that they are "employees," on a "stage and filming location," with "no reasonable expectation of privacy," for "entertainment purposes." Subscribers to "voyeurdorm.com" pay a subscription fee of $34.95 a month to watch the women employed at the premises and pay an added fee of $16.00 per month to "chat" with the women. From August 1998 to June 2000, Voyeur Dorm generated subscriptions and sales totaling $3,166,551.35.

In 1998, Voyeur Dorm learned that local law enforcement agencies had initiated an investigation into its business. In response, counsel for Voyeur Dorm sent a letter

to Tampa's Zoning Coordinator requesting her interpretation of the City Code as it applied to the activities occurring at 2312 West Farwell Drive. In February of 1999, Tampa's Zoning Coordinator, Gloria Moreda, replied to counsel's request and issued her interpretation of the City Code, concluding in relevant part:

> The following generally describes the activities occurring on the property:
>
> 1. 5 unrelated women are residing on the premises.
>
> 2. 30 Internet cameras are located in various rooms in the house; such as the bedrooms, bathrooms, living rooms, shower and kitchen.
>
> 3. For a fee, internet viewers are able to monitor the activities in the different rooms.
>
> 4. The web page address is *http://www.voyeurdorm.com/*
>
> 5. The web page shows various scenes from the house, including a woman with exposed buttocks. Statements on the page describe activities that can be viewed such as "the girls of Voyeur Dorm are fresh, naturally erotic and as young as 18. Catch them in the most intimate acts of youthful indiscretion."
>
> The web page can be found by going to Yahoo! and entering "Voyeurdorm" on the search. The name of the website is, itself, advertising the adult nature of the entertainment. Voyeur is defined in the *American Heritage Dictionary*, Second College Edition as "A person who derives sexual gratification from observing the sex organs or sexual acts of others, especially from a secret vantage point."

> It is my determination that the use occurring at 2312 W. Farwell Dr., as described in your letter, is an adult use. Section 27-523 defines adult entertainment as: "Any premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances distinguished by their display or depiction of specified anatomical areas or specified anatomical activities, as defined in this section."
>
> Please be aware that the property is zoned RS-60 Residential Single Family, and an adult use business is not permitted use. You should advise your client to cease operation at that location.

Thereafter, in April of 1999, Dan and Sharon Gold Marshlack[1] appealed the Zoning Coordinator's decision to Tampa's Variance Review Board. On or about July 13, 1999, the Variance Review Board conducted a hearing. At the hearing, Voyeur Dorm's counsel conceded the following: that five women live in the house; that there are cameras in the corners of all the rooms of the house; that

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[1] Mr. and Mrs. Marshlack are the owners of the real property located at 2312 West Farwell Drive. They lease the subject property to Voyeur Dorm.

for a fee a person can join a membership to a web site wherein a member can view the women 24 hours a day, seven days a week; that a member, at times, can see someone disrobed; that the women receive free room and board; that the women are part of a business enterprise; and that the women are paid. At the conclusion of the hearing, the Variance Review Board unanimously upheld the Zoning Coordinator's determination that the use occurring at 2312 West Farwell Drive was an adult use. Subsequently, Mr. and Mrs. Marshlack filed an appeal from the decision of the Variance Review Board to the City Council. The Tampa City Council held a hearing in August of 1999, at the conclusion of which the City Council unanimously affirmed the decision of the Variance Review Board.

Voyeur Dorm filed this action in the middle district of Florida. The City of Tampa and Voyeur Dorm then filed cross-motions for summary judgment. The district court granted Tampa's motion for summary judgment, from which Voyeur Dorm now appeals.

II. ISSUES

1. Whether the district court properly determined that the alleged activities occurring at 2312 West Farwell Drive constitute a public offering of adult entertainment as contemplated by Tampa's zoning restrictions.

2. Whether the district court properly relied on the negative secondary effects doctrine in determining the constitutionality of Tampa's zoning restrictions as applied to 2312 West Farwell Drive.

3. Whether the predicate evidence that Tampa relied upon to adopt its adult use restrictions must contemplate internet forms of communication in order to restrict internet forms of communication.

III. STANDARD OF REVIEW

This court reviews the district court's grant of a motion for summary judgment *de novo*, applying the same legal standards used by the district court. *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 995 (11th Cir. 1998).

IV. DISCUSSION

The threshold inquiry is whether section 27-523 of Tampa's City Code applies to the alleged activities occurring at 2312 West Farwell Drive. Because of the way we answer that inquiry, it will not be necessary for us to analyze the thorny constitutional issues presented in this case.

Section 27-523 defines adult entertainment establishments as

> [a]ny premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; "entertainment" as used in this definition shall

> include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section.

Tampa argues that Voyeur Dorm is an adult use business pursuant to the express and unambiguous language of section 27-523 and, as such, cannot operate in a residential neighborhood. In that regard, Tampa points out: that members of the public pay to watch women employed on the premises; that the Employment Agreement refers to the premises as "a stage and filming location"; that certain anatomical areas and sexual activities are displayed for entertainment; and that the entertainers are paid accordingly. Most importantly, Tampa asserts that nothing in the City Code limits its applicability to premises where the adult entertainment is actually consumed.

In accord with Tampa's arguments, the district court specifically determined that the "plain and unambiguous language of the City Code . . . does not expressly state a requirement that the members of the public paying consideration be *on* the premises viewing the adult entertainment." *Voyeur Dorm, L.C., et al., v. City of Tampa,* No. 99-2180 (M.D. Fla. Nov. 6, 2000) (order granting summary judgment to Tampa). While the public does not congregate to a specific edifice or location in order to enjoy the entertainment provided by Voyeur Dorm, the district court found 2312 West Farwell Drive to be "a premises on

which is offered to members of the public for consideration entertainment featuring specified sexual activities within the plain meaning of the City Code." *Id.*

Moreover, the district court relied on Supreme Court and Eleventh Circuit precedent that trumpets a city's entitlement to protect and improve the quality of residential neighborhoods. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) ("[A] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' ") (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976)); *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 996-97 (11th Cir. 1998) (noting that it is well established that the regulation of public health, safety, and morals is a valid and substantial state interest); *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1375 (11th Cir. 1993) (noting that the "Supreme Court has held [that] restrictions may be imposed to protect 'family values, youth values and the blessings of quiet seclusion' ") (internal citations omitted).

In opposition, Voyeur Dorm argues that it is not an adult use business. Specifically, Voyeur Dorm contends that section 27-523 applies to locations or premises wherein adult entertainment is actually offered to the public. Because the public does not, indeed cannot, physically attend 2312 West Farwell Drive to enjoy the adult entertainment, 2312 West Farwell Drive does not fall within the purview of Tampa's zoning ordinance. We agree with this argument.

The residence of 2312 West Farwell Drive provides no "offer[ing] [of adult entertainment] to members of the public." The offering occurs when the videotaped images

are dispersed over the internet and into the public eye for consumption. The City Code cannot be applied to a location that does not, itself, offer adult entertainment to the public. As a practical matter, zoning restrictions are indelibly anchored in particular geographic locations. Residential areas are often cordoned off from business districts in order to promote a State's interest. *See, e.g., City of Renton,* 475 U.S. at 50 ("A city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."). It does not follow, then, that a zoning ordinance designed to restrict facilities that offer adult entertainment can be applied to a particular location that does not, at that location, offer adult entertainment. Moreover, the case law relied upon by Tampa and the district court concerns adult entertainment in which customers *physically attend* the premises wherein the entertainment is performed.[2] Here, the audience or

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[2] The body of case law applying legislative restrictions to adult entertainment establishments relies on adverse effects that debase adjacent properties. *See, e.g., City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000) (relying on the negative secondary effects doctrine to uphold a city's ordinance as applied to an erotic dancing establishment); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986) (upholding a zoning ordinance that prohibited adult motion picture theaters from operating in certain locations based upon the negative secondary effects created by such theaters); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Flanigan's Enterprises, Inc. v. Fulton County,* 242 F.3d 976 (11th Cir. 2001) (holding that a local ordinance failed to further the county's purported concern with negative secondary effects and was thus unconstitutionally applied); *Ward v. County of Orange,* 217 F.3d 1350 (11th Cir. 2000); *Sammy's of Mobile, Ltd. v. City of Mobile,* 140 F.3d 993 (11th Cir. 1998); *Krueger v. City of Pensacola,* 759 F.2d 851 (11th Cir. 1985).

consumers of the adult entertainment do not go to 2312 West Farwell Drive or congregate anywhere else in Tampa to enjoy the entertainment. Indeed, the public offering occurs over the Internet in "virtual space."[3] While the district court read section 27-523 in a literal sense, finding no requirement that the paying public be *on the premises*, we hold that section 27-523 does not apply to a residence at which there is no public offering of adult entertainment. Accordingly, because the district court misapplied section 27-523 to the residence of 2312 West Farwell Drive, we reverse the district court's order granting summary judgment to Tampa. Since the resolution of this threshold issue obviates the need for further analysis, we do not reach the remaining issues regarding the constitutionality of Tampa's zoning restrictions as applied to Voyeur Dorm.

REVERSED.

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[3] *See Reno v. ACLU*, 521 U.S. 844, 851 (1997) (stating that internet communication is "a unique medium – known to its users as 'cyberspace' – located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet").

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

VOYEUR DORM, L.C.,
et al.,

Plaintiffs,

vs. Case No. 8:99-cv-2180-T-24F

THE CITY OF TAMPA,
FLORIDA,

Defendant.
_____/

ORDER

This cause comes before the Court for consideration of Defendant's Motion for Final Summary Judgment (Doc. No. 49, filed July 31, 2000) and Plaintiffs' Dispositive Motion for Summary Judgment (Doc. No. 66, filed July 31, 2000). Each party filed a response in opposition to opposing party's motion for summary judgment (Doc. Nos. 75 & 72, respectively).

Factual Background

On January 29, 1999, Plaintiffs' counsel, Mark Dolan, sent a letter to the City's Zoning Coordinator requesting her interpretation of the City Code as it applied to the activities occurring at 2312 West Farwell Drive, Tampa, Florida ("the premises").

On February 12, 1999, the City's Zoning Coordinator, Gloria Moreda, responded to the aforesaid letter and stated in relevant part:

The following generally describes the activities occurring on the property:

1. 5 unrelated women are residing on the premise.
2. 30 internet cameras are located in various rooms in the house; such as the bedrooms, bathrooms, living rooms, shower, & kitchen.
3. For a fee, internet viewers are able to monitor the activities in the different rooms.
4. The web page address is *http://www.voyeurdorm.com/*
5. The web page shows various scenes from the house, including a woman with exposed buttocks. Statements on the page describe activities that can be viewed such as 'The Girls of Voyeur Dorm are fresh, naturally erotic and as young as 18. Catch them in the most intimate acts of youthful indiscretion'.

The web page can be found by going to Yahoo! and entering 'Voyeurdorm' on the search. The name of the web site is, itself, advertising the adult nature of the entertainment. Voyeur is defined in the *American Heritage Dictionary*, Second College Edition as 'A person who derives sexual gratification from observing the sex organs or sexual acts of others, especially from a secret vantage point'.

It is my determination that the use occurring at 2312 W. Farwell Dr., as described in your letter, is an adult use. Section 27-523 defines adult entertainment as:

> Any premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any persons, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section.
>
> Please be aware that the property is zoned RS-60 Residential Single Family and an adult use business is not a permitted use. You should advise your client to cease operation at that location.

Thereafter, on or about April 12, 1999, Dan and Sharon Gold Marshlack[1] appealed the Zoning Coordinator's decision to the City's Variance Review Board. According to the Statement of Administrative Appeal filed by Mr. and Mrs. Marshlack, the section of the City Code which was appealed was "Section 27-523 as interpreted by Gloria Moreda, Zoning [Coordinator], in her letter of February 12, 1999."

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[1] Mr. and Mrs. Marshlack are the owners of the real property located at 2312 West Farwell Drive. They lease the subject property to Voyeur Dorm, L.C.

Thereafter, on or about July 13, 1999, an appellate hearing was held before the City's Variance Review Board. At the conclusion of the hearing, the Variance Review Board voted unanimously to uphold the Zoning Coordinator's determination in this matter that the use occurring at 2312 West Farwell Drive is an adult use.

Thereafter, on or about July 18, 1999, Mr. and Mrs. Marshlack filed an appeal from the decision of the Variance Review Board to the City Council. Then, on or about August 26, 1999, an appellate hearing was held before Tampa City Council in this matter. At the conclusion of the hearing, City Council voted unanimously to affirm the decision of the Variance Review Board, which had upheld the determination of the Zoning Coordinator.

Thereafter, this action was filed in this Court by Plaintiffs on September 24, 1999. Each party now moves for summary judgment in their favor.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). When the party moving for the summary judgment bears the burden of persuasion on

the issue at trial, its showing must sustain the burden as well as demonstrate the absence of a genuine dispute. *See Celotex Corp.*, 477 U.S. at 331-32. Therefore, the moving party must satisfy both the initial burden of production on the summary judgment motion, by showing that no genuine dispute exists as to any material fact, and the ultimate burden of persuasion on the claim, by showing that it would be entitled to a directed verdict at trial. When the party moving for the summary judgment does not bear the burden of persuasion on the issue at trial, the moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the non-moving party's case. *Id.* at 325. Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. *Id.* When a moving party has discharged its burden, the non-moving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. *Id.* at 324.

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the non-movant and resolve all reasonable doubts in that party's favor. *Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989); *Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). The Eleventh Circuit has explained the reasonableness standard:

> In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." [citation omitted]. The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. *Augusta Iron & Steel Works v. Employers Ins. of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

Discussion

There is no dispute that the *website* for Voyeur Dorm involves an adult entertainment business. The two main disputed issues in this action are: (1) whether Plaintiffs

use of the premises satisfies all the elements of the definition of an adult use in Section 27-523; and (2) whether the record used to support the adoption of Section 27-523 is sufficient to satisfy constitutional standards in that it did not contemplate Internet-based forms of communication.[2]

As to the first issue, Plaintiffs argue that their use of the premises does not satisfy all the elements of the definition of an adult use because it is not a premises "*on which* is offered to members of the public or any persons, for a consideration, entertainment featuring or in any way including specified sexual activities. . . . " (emphasis added). Plaintiffs argue that no member of the public was ever offered for a consideration any adult entertainment *on* the premises. Instead, the viewing of the activities of the residents by the members of the public "takes place in virtual space, via a global computer network comprised of computer servers primarily located in a office building in downtown Tampa and on other computer servers located throughout the world. Any actual viewing of any computer rendered digital images of the residents takes

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[2] It is undisputed that the premises is located in a district zoned RS-60 Residential Single Family. Under the City Code, adult uses are not permitted in a district zoned RS-60 Residential Single Family, and, in fact, are expressly prohibited in a residential district zoned RS-60. Adult uses are permitted only in the CI, IG and IH districts. Moreover, in order to obtain approval of an S-1 permit for an adult use in the CI, IG and IH districts, it is necessary for the applicant to satisfy the specific standards set forth under § 27-272 for an adult use including the distance separation requirement that "[n]o adult use shall be located within five hundred (500) feet of any residential or office district." Section 27-272 of the City Code.

place in the homes and offices of subscribers to the Voyeur Dorm web site." Affidavit of David G. Marshlack, ¶ 10. Accordingly, Plaintiffs contend that their use of the premises does not constitute an adult use.

It is well established that the plain meaning of a statute or ordinance is the polestar of statutory construction. In *Hughes Aircraft Co. v. Jacobson*, 119 S. Ct. 755, 760 (1999), the United States Supreme Court unanimously held that "As in any case of statutory construction, our analysis begins with the 'language of the statute' . . . And where the statutory language provides a clear answer, it ends there as well."

Similarly, the Eleventh Circuit held that " 'In construing a statute we must begin, and often should end as well, with the language of the statute itself.' " *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir. 1997)), *cert. denied*, 120 S. Ct. 335 (1999).

Accordingly, this Court must apply the plain and unambiguous language of the City Code and may not read language into it that does not appear on its face. There is no language in the City Code that expressly states a requirement that the members of the public paying consideration be *on* the premises viewing the adult entertainment. The plain language of the City Code includes any premises "on which is offered to members of the public or any persons, for a consideration, entertainment featuring or in any way including specified sexual activities. . . . " The premises at 2312 West Farwell Drive is clearly a premises on which is offered to members of

the public for consideration entertainment featuring specified sexual activities under the plain meaning of the City Code. To construe the City Code otherwise would require that this Court read language into the City Code requiring that the members of the public be present at the premises.

This Court also takes into consideration that, as a matter of zoning law, the City is entitled to protect and improve the quality of residential neighborhoods. Indeed, the Eleventh Circuit has noted that the "Supreme Court has held restrictions may be imposed to protect 'family values, youth values and the blessings of quiet seclusion.' " *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1375 (11th Cir. 1993) (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974)[3]), *cert. denied*, 511 U.S. 1018 (1994).

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[3] In *Village of Belle Terre v. Boraas*, where the Supreme Court upheld the constitutional validity of an ordinance which prohibited more than two unrelated persons from living in the same dwelling, the Court stated that "[t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Boraas*, 416 U.S. at 9. The Supreme Court's decision in *Boraas* has subsequently been cited with favor in numerous cases including, but not limited to, *Farrell v. City of Miami*, 587 F. Supp. 413, 416 (S.D. Fla. 1984) (wherein the court upheld the validity of an ordinance limiting the commercial use of a residentially zoned property), *aff'd*, 758 F.2d 658 (11th Cir. 1985). In *Farrell*, the court made clear that an ordinance which seeks to protect residential neighborhoods by limiting commercial uses of a house has been recognized as a proper restriction on the use of residential property.

In addition, the Court notes that the law is well established that an agency's interpretation of a statute that is charged with enforcing it is entitled to great weight and deference. In fact, a reviewing court may not overturn an agency's interpretation of a statute that is charged with administering a statute unless the agency's interpretation is clearly erroneous. *See Department of Health & Rehabilitative Serv. v. A.S.*, 648 So.2d 128, 132 (Fla. 1995); *PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla. 1988).

> When an agency with authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though another interpretation may be possible. Since [the city's] interpretation was entitled to such great weight and was not shown to be clearly erroneous, the trial court erred by not accepting the city's interpretation. . . .

Seibert v. Bayport Beach & Tennis Club Ass'n, 573 So.2d 889, 892 (Fla. 2d DCA 1990) (citations omitted), *rev. denied*, 583 So.2d 1034 (Fla. 1991). This Court cannot find that the Zoning Coordinator's determination was clearly erroneous.

The second issue before this Court is the Plaintiffs' argument that there was an improper predicate for the adoption of the City's adult use ordinance and/or that there are no secondary effects created by the premises in question.

It is well established that the regulation of adult entertainment businesses has to serve a legitimate governmental interest such as the prevention of adverse secondary effects caused by the adult entertainment

establishments. *Young v. American Mini Theatres*, 427 U.S. 50 (1976). Plaintiffs argue that there is significant doubt as to the validity of the City's record, particularly as it relates to any Internet-based "e-commerce" form of communication, because there is no possible way that the characteristics of this form of communication could have been considered at the time the City of Tampa considered the record upon which it relied in adopting the adult use ordinance. Plaintiffs further argue that there is no evidence of secondary effects occurring at 2312 West Farwell Drive.

The Eleventh Circuit has held that the evidence of *actual* adverse secondary effects was of no moment. *International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157 (11th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992). "[Plaintiff] further argues that there is uncontradicted evidence in the record that Thee Dollhouse III has not in fact caused any adverse effects on surrounding property values and that property values have actually increased at a higher rate than before the opening of Thee Dollhouse III. *This argument hold no weight." Id.* at 1163 (emphasis added).

Similarly, in *T-Marc, Inc. v. Pinellas County*, 804 F. Supp. 1500 (M.D. Fla. 1992), the court held that the County of Pinellas was not required to actually experience adverse secondary effects from adult use establishments prior to enacting an ordinance restricting the location of such adult use establishments. The court held in relevant part:

> Plaintiffs contend that . . . the county failed to recognize evidence which rebutted the existence

> of such adverse secondary effects. This argument fails under *International Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1294, 117 L.Ed.2d 517 (1992). In *International Eateries*, the plaintiff failed to invalidate distance ordinances even where uncontradicted evidence existed that the [adult use establishments] had not in fact caused any adverse effects on surrounding property values and that the property values had actually increased at a higher rate than before the opening of the [adult use establishments]. *Id.* at 1163. Thus, this Court adopts the finding that the County is not required to actually experience the secondary effects prior to enacting the ordinance. Rather, the County may rely on the secondary effects suffered by other cities.

T-Marc, 804 F. Supp. at 1503-04 (citations omitted).

Similarly, in *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641 (M.D. Fla. 1994), *aff'd per curiam*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996), where "Plaintiff vigorously argue[d] that a trial [was] necessary to explore and decide fact issues relating to . . . whether there are, in actuality, any adverse secondary effects of adult entertainment establishments," the court expressly rejected the plaintiff's argument. *Id.* at 644. The court stated in relevant part that "[e]vidence about secondary effects or, rather, the lack of them, is . . . clearly foreclosed." *Id.* at 645. Accordingly, the Plaintiffs' expert reports regarding the secondary effects of the subject premises, or lack thereof, are irrelevant to this Court's analysis, and there is no merit to Plaintiffs' argument that

there are no *actual* secondary effects from the activities at the premises.

As for the issue of whether the predicate for the adoption of the adult use ordinance was proper or not, as it relates to any Internet-based "e-commerce" form of communication, because it could not have specifically taken into consideration the characteristics of this form of business at the time the adult use ordinance was adopted, the following case law is instructive. In *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, 120 S. Ct. 1553 (2000), the Eleventh Circuit, quoting *Cafe 207*, stated:

> "It is now established as a matter of law by Supreme Court jurisprudence culminating in [*Barnes*[4]] that secondary effects of proscribed conduct may be taken into consideration by a court evaluating the governmental interests justifying impingement upon free speech rights even when, as in *Barnes*, there is no legislative history demonstrating that the lawmakers actually considered secondary effects or any other specific factor (such as protecting order and morality) in enacting the challenged law."

Sammy's, 140 F.3d at 997 n. 6 (quoting *Cafe 207*, 856 F.Supp. at 645).

The Supreme Court in *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), has also discussed the appropriateness of a court giving the lawmakers leeway in justifying a law based on secondary effects.

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[4] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

> [T]he government should have sufficient leeway to justify such a law based on secondary effects. On this point, *O'Brien*[5] is especially instructive. The Court there did not require evidence that the integrity of the Selective Service System would be jeopardized by the knowing destruction or mutilation of draft cards. It simply reviewed the Government's various administrative interests in issuing the cards, and then concluded that "Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them." 391 U.S., at 378-380, 88 S.Ct. 1673. There was no study documenting instances of draft card mutilation or the actual effect of such mutilation on the Government's asserted efficiency interests. But the Court permitted Congress to take official notice, as it were, that draft card destruction would jeopardize the system. The fact that this sort of leeway is appropriate in a case involving conduct says nothing whatsoever about its appropriateness is a case involving actual regulation of First Amendment expression.[6] As we have said, so long as the regulation is unrelated to the suppression of

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[5] *United States v. O'Brien*, 391 U.S. 367 (1968).

[6] This case is clearly one in which conduct is being regulated, not First Amendment expression. The adult use ordinance does not attempt to regulate the primary effects of expression, i.e., the effect on the audience of watching adult entertainment, but rather the secondary effects, such as the impacts on public health, safety, and welfare. *See City of Erie*, 120 S. Ct. at 1392; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 50 (1986).

> expression, "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas v. Johnson*, 491 U.S., at 406, 109 S. Ct. 2533. *See, e.g., United States v. O'Brien, supra*, at 377, 88 S. Ct. 1673; *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 86 L.Ed.2d 536 (1985) (finding sufficient the Government's assertion that those who had previously been barred from entering the military installation pose a threat to the security of that installation); *Clark v. Community for Creative Non-Violence*, 468 U.S., at 299, 104 S. Ct. 3065 (finding sufficient the Government's assertion that camping overnight in the park poses a threat to park property).

City of Erie, 120 S. Ct. at 1396; *see also Ward v. County of Orange*, 217 F.3d 1350, 1353 (11th Cir. 2000) (citing *City of Erie* with favor).

"[I]t is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such 'legislative facts' within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment." *City of Erie*, 120 S. Ct. at 1395.

Based on this case law, there can be no finding that there was an improper predicate for the adoption of the City's adult use ordinance simply because the lawmakers could not have considered the specific characteristics of Internet-based e-commerce at the time of the adoption of the adult use ordinance. Even though the studies relied upon did not evaluate the secondary effects of Internet-based "e-commerce" adult entertainment businesses, the studies did evaluate secondary effects that are similarly

applicable to an adult entertainment business connected to its customers via the Internet. The City need not prove that Plaintiffs' business would likely have the exact same adverse effects on its surroundings as the adult businesses previously studied. So long as the adult use ordinance affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, the City must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems. *American Mini Theatres,* 427 U.S. at 71; *ILQ Inv., Inc. v. City of Rochester,* 25 F.3d 1413, 1418 (8th Cir.), *cert. denied,* 513 U.S. 1017 (1994).

The Supreme Court has held that a city's interest in protecting the quality of urban life from the secondary effects of adult businesses serves a substantial governmental interest. *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 50 (1986). The Supreme Court also held that a city is not required to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. *Id.* at 53.

"[A] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' " *City of Renton,* 475 U.S. at 50 (quoting *American Mini Theatres,* 427 U.S. at 71). It is well established that the regulation of public health, safety and morals is a valid and substantial state interest. *Sammy's,* 140 F.3d at 996-97. This Court finds that the City had a reasonable basis for believing that its adult use ordinance would

serve its substantial governmental interest and that substantial governmental interest is applicable to the adult use occurring at 2312 West Farwell Drive.[7]

Because this Court finds that the activities occurring at 2312 West Farwell Drive constitute an adult use pursuant to the City Code and that the City Code is based upon a proper predicate and is justified based on secondary effects, the remaining claims raised by Plaintiffs' complaint are meritless.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's Motion for Final Summary Judgment (Doc. No. 49) is **GRANTED.** Defendant's request for attorney's fees is **DENIED.** The Clerk is directed to enter judgment in favor of the Defendant and **CLOSE** this case.

DONE AND ORDERED at Tampa, Florida, this 6th day of November, 2000.

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[7] This Court, in *Specialty Malls of Tampa v. City of Tampa*, 916 F. Supp. 1222 (M.D. Fla. 1996), *aff'd*, 109 F.3d 770 (11th Cir. 1997), wherein plaintiffs' counsel also argued that there was an improper predicate for the adoption of the adult use ordinance, expressly rejected this argument and granted the City's motion for summary judgment stating:

> The Court finds that the City of Tampa laid a proper predicate for adoption of the Ordinance. The Ordinance notes that the locational criteria pertaining to adult uses "was initially adopted based on studies presented at previous public hearings demonstrating such uses have deleterious effects on adjacent property. . . ."

Id. at 1230.

/s/ Susan C. Bucklew
SUSAN C. BUCKLEW
United States District Judge

Copies to Counsel of Record

IN THE UNITED STATES OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16346-FF

VOYEUR DORM, L.C., a Florida Limited liability company, ENTERTAINMENT NETWORK, INC., a Florida corporation, AUTUMN DAWN MARENGER, 2 D&K, INC.,

Plaintiffs-Appellants,

DAN MARSHLACK,
SHARON GOLD MARSHLACK,

Plaintiffs,

versus

CITY OF TAMPA, FL, a Florida municipal corporation,

Defendant-Appellee.

On Appeal from the
United States District Court for the
Middle District of Florida

(Filed Nov. 15, 2001)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: TJOFLAT, DUBINA and DUHE*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

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* Honorable John M. Duhe, Jr., U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX D

AGREEMENT

THIS AGREEMENT is made in Tampa, Florida, on the 1st day of June, 1999, between Voyeur Dorm, L.C. a Florida limited liability company having its principal office at 6965 1st avenue North, St. Petersburg, Florida 33710 ("VDORM"), and Autumn Marenger. ("EMPLOYEE").

WITNESSETH:

WHEREAS, VDORM is engaged in the business of, among other business lines, providing Internet based entertainment services to customers throughout the world and has invested substantially in the development of computer techniques, marketing programs, software, services, systems, and other confidential property, information, and trade secrets, and inventions, discoveries, improvements or developments (herein designated "inventions"); and

WHEREAS, VDORM enters into contracts with its customers and must ensure that customer programs, data, and information remain confidential; and

WHEREAS, the EMPLOYEE in the course of his or her employment has access to inventions, and to such techniques, programs, software, services, systems, and other confidential property, information, and trade secrets of VDORM and the customers of VDORM; and,

WHEREAS, the EMPLOYEE acknowledges that it is essential to the conduct of VDORM's business and to the protection of the investment of its members that such

information be kept confidential and treated as secret and that its customer relationships must be protected; and,

WHEREAS, VDORM desires to protect and preserve its trade secrets and confidential business information and to protect its customer relationships; and

WHEREAS, the EMPLOYEE desires to enter the employment of, or to maintain his or her employment with, VDORM;

WHEREAS, EMPLOYEE desires and intends to allow VDORM or its assigns, to commercially photograph and broadcast the images and likeness of EMPLOYEE, live, over the internet 24 hours a day 7 days a week, as hereinafter provided; and,

WHEREAS, in consideration of EMPLOYEE allowing VDORM or its assigns, to commercially photograph and broadcast the images and likeness of EMPLOYEE, live over the internet 24 hours a day 7 days a week, as hereinafter provided, VDORM agrees to allow EMPLOYEE to occupy and use a furnished bedroom and all common areas at the furnished dwelling located at 2312 Farwell Drive, Tampa, Florida, 33603, and other benefits as set out below, on the following terms and conditions;

NOW THEREFORE, IT IS AGREED:

1. TERM: This Agreement commences on June 1, 1999 and may be terminated at will by either party.

   a. Notwithstanding any provisions to the contrary contained in this Agreement, VDORM may deliver a written notice of cancellation of this Agreement to EMPLOYEE, at will.

b. Upon delivery of the termination notice EMPLOYEE'S employment by VDORM shall immediately terminate and the EMPLOYEE shall immediately remove her personal property, leave and surrender the premises to VDORM.

2. MUTUAL CONSIDERATION: In return for the benefits set out herein to be provided by VDORM to EMPLOYEE during the term of this Agreement, EMPLOYEE, during the term of this Agreement, shall allow VDORM to commercially photograph and broadcast the likeness of EMPLOYEE, live, over the internet 24 hours a day 7 days a week, as hereinafter provided.

3. OCCUPANCY: The premises shall be occupied only by EMPLOYEE and other EMPLOYEEs approved by VDORM and no others as a private residence and for no other use or purpose.

4. ASSIGNMENT: Without the prior written consent of VDORM, EMPLOYEE shall not assign this Agreement.

5. UTILITIES: VDORM agrees to pay for all utilities, including electricity and local telephone, used by EMPLOYEE at the Farwell location, during the term of this Agreement. VDORM shall pay water and sewer charges and the cost of garbage and trash collection.

6. REPAIRS: EMPLOYEE shall take good care of the premises and the appliances and fixtures in them. VDORM shall, at VDORM's expense, perform all ordinary repairs and maintenance to the premises. However, VDORM may repair, at the expense of EMPLOYEE, all damage or injury to the premises, or to the building, done by EMPLOYEE or EMPLOYEE's agents, visitors, or licensees, caused

by installation or removal of furniture or other property, or resulting from the overflow of water, or any other cause, due to the carelessness, negligence, or improper conduct of EMPLOYEE or EMPLOYEE's, agents, visitors, or licensees. There shall be no liability on the part of VDORM for the making of any repairs, alterations, additions, or improvements in, or to any portion of, the building or premises, and no liability on VDORM for failure to make any repairs, alterations, additions, or improvements in, or to any portion of, the building or premises.

7. ANIMALS: EMPLOYEE shall keep no domestic or other animals in, about, or on the premises without the prior written consent of VDORM.

8. GUESTS: EMPLOYEE shall NOT permit or allow any guests on the premises without the prior written consent of VDORM.

9. ENTRY: EMPLOYEE acknowledges that the premises are, in addition to being the residence of EMPLOYEE, a stage and filming location for commercial internet broadcasting of the day to day activities of EMPLOYEE and other fellow EMPLOYEES, 24 hours per day, 7 days a week. VDORM's agents shall have the right to enter the premises at all hours for any purpose whatsoever related to the business of VDORM and whenever necessary to make repairs and alterations. EMPLOYEE shall make no alterations, changes, or improvements to the house and outside premises.

10. EMPLOYEE'S OBLIGATIONS.

    A. EMPLOYEE shall not touch, alter, move or in any way interfere with the location or operation of the "LIVE HIDDEN VOYEUR CAMERAS" that are located in and on the premises, or that

may from time to time be located on the premises.

B. EMPLOYEE agrees to defend, indemnify, save and hold VDORM, its assigns, employees, officers and directors harmless from and against all claims, damages, losses and expenses including attorney's fees arising out of EMPLOYEE's activities while on the premises, which are for bodily injury, illness or death, criminal charges or for property damage, including loss of use, and caused in whole or in part by the EMPLOYEE's act of omission.

C. EMPLOYEE shall be responsible for all conditions created or caused by the negligent or wrongful act or omission of the EMPLOYEE, or other person on the premises with EMPLOYEE's consent.

D. At all times during the term of this Agreement, the EMPLOYEE shall:

i. Keep the premises clean and sanitary.

ii. Remove all garbage in a clean and sanitary manner.

iii. Keep all plumbing fixtures clean and sanitary.

iv. Not destroy, deface, damage, impair, or remove any part of the premises or property in them belonging to VDORM, or permit any person to do so.

v. Conduct herself, and require other persons on the premises with EMPLOYEE'S consent to conduct themselves, in a manner that does not unreasonably disturb other employees, the neighbors or constitute a breach of the peace.

vi. Use and operate in a reasonable manner all electrical plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances.

vii. Comply with all rules and regulations promulgated by VDORM and VDORM's designated Agents, (housemothers) as they may be appointed from time to time.

11. EMPLOYEE ACKNOWLEDGEMENT. EMPLOYEE acknowledges and consents that at all times that she is present on the premises, she will be monitored and photographed by "LIVE HIDDEN VOYEUR CAMERAS" and that same will be commercially broadcast, live and unedited over the internet, 24 hours a day, 7 days a week. EMPLOYEE acknowledges that she has received, understood and for value received, signed a "RELEASE" of even date herewith.

12. WASTE AND NUISANCE: EMPLOYEE agrees that EMPLOYEE will not commit waste on the premises, will not maintain or permit to be maintained a nuisance on the premises, nor will use the premises, or permit their use, in an unlawful manner.

13. REQUIREMENTS OF LAW: EMPLOYEE shall comply with all laws, orders, and regulations of federal, state, county, and municipal authorities that impose any duty on VDORM or EMPLOYEE with respect to the premises or the use or occupation of them. EMPLOYEE shall not do, or permit to be done, any act or thing on the premises that shall or might subject VDORM to any liability or responsibility for injury to any person or persons or to any property by reason of any operation occurring on the premises. EMPLOYEE shall reimburse VDORM for all expenses incurred as a result of EMPLOYEE, or EMPLOYEE'S family, EMPLOYEE'S, agents,

licensees, or visitors, who violate the covenants and terms of this Agreement.

14. WAIVERS: A waiver by VDORM of a breach of any covenant or duty of EMPLOYEE under this Agreement is not a waiver of a breach of any other covenant or duty of EMPLOYEE, or of any subsequent breach of the same covenant or duty.

15. END OF TERM: On the termination of this Agreement, EMPLOYEE shall immediately quit and surrender the premises to VDORM in as good condition as they were at the commencement of this Agreement, ordinary wear excepted, and EMPLOYEE shall immediately remove all of her personal property.

16. FEES AND EXPENSES: If EMPLOYEE defaults in the performance of any term or covenant required under this Agreement, VDORM may immediately or at any time after the default and without notice to the EMPLOYEE, perform the obligation. VDORM's expenses or obligation for the payment of money, including attorneys' fees, in instituting, prosecuting, or defending any action or proceeding including interest and costs, are due and payable by EMPLOYEE to VDORM within three days following the presentation of a bill or statement to EMPLOYEE. If the Agreement term has expired at the time the VDORM makes these expenditures or incurs these obligations, the amounts are recoverable by the VDORM from the EMPLOYEE as damages.

17. INTERRUPTION OF SERVICE: Interruption or failure of any service in the building, if due to causes beyond VDORM'S control, shall not entitle EMPLOYEE to any claim against VDORM, and shall not constitute breach unless VDORM shall fail to take measures as may be reasonable in the circumstances to restore the service without undue delay.

18. ABANDONMENT: If at any time during the term of this Agreement, EMPLOYEE abandons the premises, VDORM may reenter the premises, by any means, without being liable for any prosecution, and without becoming liable to EMPLOYEE for damages or for any payment of any kind whatever. If the EMPLOYEE surrenders or abandons the premises, VDORM shall not be liable or responsible for storing or disposing of any of the EMPLOYEE's personal property remaining on the premises. In the absence of actual knowledge of abandonment, VDORM may presume that the EMPLOYEE has abandoned the premises if she is absent from the premises for a period of three days unless VDORM has agreed to the absence in writing prior to an intended absence.

19. USE OF GOODS AND CHATTELS: EMPLOYEE covenants that EMPLOYEE will carefully and economically use the appliances contained in the house and further covenants that EMPLOYEE will not transfer the use or possession of the appliances to any other person, without the written consent of VDORM. EMPLOYEE will repair all injury and pay all damages that may happen or accrue to the appliances during the term of this Agreement arising out of EMPLOYEE's negligence.

20. VEHICLES: EMPLOYEE shall not keep or permit to be kept on the premises any junk vehicle, vehicle on which current registration plates are not displayed trailer, truck, camper, camp truck, house trailer, boat, motorcycle, van or the like, nor shall there be any repair or extraordinary maintenance of automobiles or other vehicles on the property.

21. COMPENSATION: EMPLOYEE acknowledges and consents that VDORM shall commercially broadcast the likeness and images of EMPLOYEE, live over the internet 24 hours a day, seven days a week, and

covenants and agrees with VDORM that EMPLOYEE shall receive compensation as set forth in Exhibit B hereto. EMPLOYEE acknowledges and expressly agrees and consents to the schedule of deductions and offsets for rule infractions set forth in Exhibit B.

22. EXTENT OF SERVICE. As part of EMPLOYEE'S duties, EMPLOYEE agrees to devote 8 hours per day, 6 days per week, to the following on camera activities:

E. 3-4 hours of "chat" per day.

F. 4-5 hours per day of "scheduled activities". Included within "scheduled activities" by way of example and not limitation are; swimming, tanning, working out, aerobics, theme parties and special events, studying, arts and crafts, personal grooming and ablutions, selecting attire and dressing, and such other activities that VDORM may from time to time specify.

G. EMPLOYEES shall study class assignments not less than 1.5 hours per day as part of their educational obligation.

H. Attend and complete not less that 6 credit hours of college level courses per term.

23. BONUS: Provided that EMPLOYEE fully and faithfully complies with all terms and conditions of this Agreement for the term(s) set out below, VDORM shall pay to EMPLOYEE the monies set out below adjacent to the respective term(s):

a. Upon completion of four months the sum of:	$ 400.00
b. Upon completion of eight months an additional sum of:	$ 800.00
c. Upon completion of one year an additional sum of:	$1,200.00

24. RESTRICTIVE COVENANT. During her employment with VDORM and for a period of two (2) years immediately following termination of such employment, whether by termination of this Employment Agreement by VDORM with or without cause, wrongful discharge, or for any other reason whatsoever, the EMPLOYEE shall not, directly or indirectly, either as an individual on her own account or as a partner, joint venturer, employee, agent, salesman, contractor, officer, director, or stockholder or otherwise, enter into, engage in, or accept employment from any business in competition with the business of VDORM, as such business now exists or as it may exist at the time of termination, anywhere in the United States ("the Restrictive Covenant"); this Restrictive Covenant specifically includes as prohibited businesses, but it is not limited to, providing Internet entertainment based on a residential setting, and the like.

This Restrictive Covenant on the part of the EMPLOYEE is given and made by the EMPLOYEE to induce VDORM to employ the EMPLOYEE and to enter into this Employment Agreement with the EMPLOYEE, and the EMPLOYEE hereby acknowledges the sufficiency of the consideration for this Restrictive Covenant.

This Restrictive Covenant shall be construed as an agreement independent of any other provision in this Agreement, and the existence of any claim or cause of action of the EMPLOYEE against VDORM, whether predicated upon this Agreement or otherwise, shall not constitute a defense to the enforcement by VDORM of this Restrictive Covenant. VDORM has fully performed all obligations entitling it to this Restrictive Covenant, and this Restrictive Covenant therefore is not executory or otherwise subject to rejection under the Bankruptcy Code.

This Restrictive Covenant is a reasonable and necessary restraint of trade and does not violate the Sherman Antitrust Act, the Florida Antitrust Act, or the common law; it is supported by valid business interests, including the protection of VDORM trade secrets and confidential business information and the protection of VDORM'S relationships with its customers and prospective customers, and the two (2)-year restriction is essential to the full protection of those valid business interests.

If any portion of this Restrictive Covenant is held by a court of competent jurisdiction to be unreasonable, arbitrary, or against public policy for any reason, this Restrictive Covenant shall be considered divisible as to line of business, time, and geographic area; if a court of competent jurisdiction should determine the specified lines of business, the specified period, or the specified geographic area to be unreasonable, arbitrary, or against public policy for any reason, a narrower line of business, a lesser period, or a smaller geographic area that is determined to be reasonable, non-arbitrary, and not against public policy for any reason, may be enforced by VDORM against the EMPLOYEE.

25. RESTRICTIVE COVENANT-REMEDIES. VDORM and the EMPLOYEE agree that, in the event of a breach by the EMPLOYEE of the Restrictive Covenant set forth in Paragraph 24, above, such a breach would irreparably injure VDORM and would leave VDORM with no adequate remedy at law, and VDORM and the EMPLOYEE further agree that, if legal proceedings (including arbitration proceedings) should have to be brought by VDORM against the EMPLOYEE to enforce the Restrictive Covenant, VDORM shall be entitled to all available civil remedies, including without limitation:

A. Preliminary and permanent injunctive relief restraining the EMPLOYEE from violating, directly or indirectly, either as an individual on his or her own account or as a partner, joint venturer, employee, agent, salesman, contractor, officer, director, or stockholder or otherwise, the restrictions of this Agreement;

B. Attorneys' fees in the trial and appellate courts and in all arbitration proceedings; and,

C. Costs and expenses of investigation, litigation, and arbitration, including expert witness fees, deposition costs (appearance fees and transcript charges), injunction bond premiums, travel and lodging expenses, arbitration fees and charges, and all other reasonable costs and expenses.

Nothing in this Employment Agreement shall be construed as prohibiting VDORM from pursuing any other legal or equitable remedies available to it for breach or threatened breach of the Restrictive Covenant.

If the EMPLOYEE violates the Restrictive Covenant, directly or indirectly, either as an individual on her own account or as a partner, joint venturer, employee, agent, salesman, contractor, officer, director, or stockholder or otherwise, any and all sales of services by the EMPLOYEE (or the partnership, joint venture, corporation, or other entity with which he or she is associated) in competition with the services of VDORM shall be conclusively presumed to have been made by VDORM but for the violation of the Restrictive Covenant.

Should legal proceedings (including arbitration proceedings) have to be brought by VDORM against the EMPLOYEE to enforce the Restrictive Covenant, the

period of restriction shall be deemed to begin running on the date of entry of an order granting VDORM preliminary injunctive relief and shall continue uninterrupted for the next succeeding two (2) years; the EMPLOYEE acknowledges that such purposes and effect would be frustrated by measuring the period of restriction from the date of termination of employment where the EMPLOYEE failed to honor the Restrictive Covenant until directed to do so by court order. VDORM and the EMPLOYEE agree that, if VDORM is granted preliminary injunctive relief under this Agreement, an injunction bond of no more than $5,000 shall be sufficient to indemnify the EMPLOYEE for any costs or damages that she might incur if the Court ultimately determines that the EMPLOYEE was wrongfully enjoined.

26. NON-DISCLOSURE – TRADE SECRETS: The EMPLOYEE during the term of this Agreement will have access to and become familiar with various trade secrets, consisting of formulas, patterns, devices, techniques, equipment, secret inventions, processes, and compilations of information, records, and specifications, that are owned by VDORM and that are regularly used in the operation of VDORM's business. The EMPLOYEE shall not disclose any of these trade secrets, directly or indirectly, or use them in any way, either during the term of this Agreement or at any later time. All files, records, documents, drawings, specifications, equipment, and similar items relating to the business of VDORM, whether prepared by the EMPLOYEE or otherwise coming into the EMPLOYEE's possession, shall remain the exclusive property of the VDORM and shall not be removed from the premises under any circumstances whatsoever without the prior written consent of VDORM.

27. **PRIVACY: PURSUANT TO FLORIDA STATUTES 810.14, *et seq*, EMPLOYEE HEREBY ACKNOWLEDGES THAT SHE HAS NO REASONABLE EXPECTATION OF PRIVACY WHILE ON THE PREMISES AND EXPLICITLY AGREES AND CONSENTS TO HAVING HER IMAGES AND LIKENESS COMMERCIALLY BROADCAST BY VDORM, LIVE OVER THE INTERNET 24 HOURS A DAY, 7 DAYS A WEEK.**

28. **NON-TENANCY, EMPLOYEE EXPRESSLY AGREES AND ACKNOWLEDGES THAT: (i) SHE IS NOT A TENANT OF VDORM; AND (ii) SHE WAIVES ANY RIGHTS THAT SHE MAY HAVE AS A RESIDENTIAL TENANT UNDER FLORIDA STATUTE § 83, *ET SEQ*.**

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year written above.

_____	/s/ Heather Martin
Voyeur Dorm, L.C.	Witness
By: /s/ Bruce Hammil	
/s/ Autumn Marenger	/s/ B – H –
EMPLOYEE	Witness

EXHIBIT B

EMPLOYEE: Autumn Marenger

WEEKLY SALARY OF: $425,

BEGINNING 6-1-99.

AUTHORIZED DEDUCTIONS AND SET OFFS

I, the undersigned Employee do hereby expressly authorize Voyeur Dorm, L.C., to take the following actions and to deduct from my weekly salary the following sums:

1.	Unauthorized absence from house.	$100.00 each occurrence.
2.	Unauthorized absence from chat.	$ 50.00 each occurrence
3.	Failure to participate in scheduled activities.	$ 50.00 each occurrence
4.	Unauthorized contact with a customer or any person met or contacted via Voyeur Dorm on-line chat.	Immediate termination and forfeiture of any accrued bonus.
5.	Covering or moving of cameras.	Immediate termination and forfeiture of any accrued bonus.

/s/ Autumn Marenger
Employee

6-1-99
Date

No. 01-902

IN THE

Supreme Court of the United States

THE CITY OF TAMPA, FLORIDA,

Petitioner,

v.

VOYEUR DORM, L.C., ENTERTAINMENT NETWORK, INC., AUTUMN DAWN MARENGER; and 2D&H, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

LUKE CHARLES LIROT
Counsel of Record
MARK R. DOLAN
Attorneys for Respondents
112 East Street, Suite B
Tampa, Florida 33602
(813) 221-9533

171823

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Whether municipal zoning regulations, which by their very nature deal only with the use of land, can be used as a pretext to censor communication and expression which takes place only via the "Internet," where such communication, expression, and even commerce are conducted in "virtual space," particularly when the United States Supreme Court has consistently recognized that geographical concepts are totally inapplicable to computer based global communications.

2. Whether a municipal zoning regulation may be "administratively interpreted" in such a way as to make a mockery of the "secondary effects doctrine" necessary to insulate adult entertainment zoning regulations from being unconstitutionally content based, as the United States Supreme Court has consistently held in *Young v. American Mini Theaters, Inc.*, and *City of Renton v. Playtime Theatres, Inc.*, and their progeny.

CORPORATE DISCLOSURE STATEMENT

Respondent, Voyeur Dorm, L.C., is a Florida limited liability company whose sole operating member is Respondent, Entertainment Network, Inc., a Florida corporation. Respondent, 2D&H, Inc., is also a Florida corporation. The Respondent entities are not publicly held, and there are no parent companies or subsidiaries which are publicly held, nor does any publicly held company owns any of the Respondent corporations' shares of stock.

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REASONS FOR DENYING THE WRIT

1. The Eleventh Circuit's Reversal of a District Court Order Granting Summary Judgment, Which is Not in Conflict With Any Decision of the United States Supreme Court Nor Any United States Court of Appeals, Does Not Justify The Exercise of Certiorari Jurisdiction.

While Rule 10 sets forth the latest attempt to simplify the generalizations long known to be relevant to the grant of certiorari, it is clear that a petition for writ of certiorari "will be granted only when there are special and important reasons therefor." In the instant case, the procedural status of this matter alone supports the denial of the requested writ. From a procedural standpoint, the immediate opinion below, reported at 265 F.3d 1232 (11th Cir. 2001), simply reverses the Order of the District Court granting the City of Tampa's Motion for Final Summary Judgment. The Eleventh Circuit Opinion does not direct entry of judgment in favor of the Respondents herein, and, even though the Opinion eloquently and accurately points out the absurdity of the original grant of summary judgment, it would appear that the case remains at issue under the auspices of the District Court.

This position is supported by the facts that no motion filed under FRAP 41 was made to stay the issuance of the mandate from the Eleventh Circuit, no motion to stay or recall the mandate was made under Eleventh Circuit Rule 41-1, and, simply by analyzing the procedural posture of this matter, it would appear that the case is at issue and active before the District Court. Rule FRAP 41(c) provides that the mandate is effective when the Circuit Court issues it. A Court of Appeals' judgment or order is not final until issuance of a

mandate, at which time the party's obligations become fixed. Additionally, neither the filing nor the granting of the petition for writ of certiorari operates as a stay, either with respect to the execution of the judgment below or the issuance of the mandate below to a lower court. *See St. Regis Paper Company v. United States*, 365 U.S. 857, 858 (1961), where this Court, in granting certiorari, also granted petitioner's motion for stay tolling the further running and accumulation of forfeitures pursuant to a statute as applied to the court below, pending this Court's disposition of the writ of certiorari, noting that the grant of certiorari alone would not have operated as such a stay.

Of course, the issuance of the lower court's mandate does not destroy the power of this Court to review the lower court's judgment (*see United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983)), it simply underscores the status of the instant case as being one where the District Court's drastic and extraordinary grant of summary judgment was reversed, obviously because there were "genuine issues as to material facts" that remain to be determined before the District Court. Certiorari jurisdiction, while clearly inappropriate is also undeniably premature.

2. The Decision of The Eleventh Circuit is Not in Conflict With Any Decision of This Court And Eloquently And Appropriately Rejected The Absurdity of The District Court's Application of Municipal Regulations Dealing With Real Property to Forms of Communication Taking Place in Virtual Space Over The Internet.

In its continued attempt to beat a virtual dead horse with frayed computer cables, the Petitioner again tries to improperly inflame disciplined judicial minds with salacious but irrelevant descriptions of the "content" of communication taking place over the internet. In the Petition, extensive reference is made to this Court's evaluation of the constitutionality of *zoning ordinances* that dealt specifically with adult entertainment businesses which were allegedly problematic and, on first blush, clearly unconstitutionally content based. This same argument was presented to the Eleventh Circuit and was appropriately rejected.

In addition to the procedural reasons for denying certiorari review, it is clear that the Petitioner in this action has tried to inappropriately characterize a judicial analysis of the *facts* involved in the instant matter as a misapplication of legal principles that somehow manifest the "special and important reasons" justifying the exercise of certiorari jurisdiction. The Eleventh Circuit, in concluding that municipal zoning legislation is not applicable to communication taking place over the internet, has raised neither any important constitutional issue nor any important federal statutory issue. It has simply concluded, properly, that an analysis of the facts in the case simply does not support the application or analysis of adult entertainment zoning legislation.

As this Court has repeatedly stated, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.). Additionally, since the instant case originally turned on a *municipal* administrative decision (that being the preposterous stretch of zoning definitions by the Petitioner's Zoning Administrator to attempt to censor communication over the internet), it has consistently been the position of this Court to hold that the responsibility of assessing a record to determine whether even *federal* agency findings are supported by substantial evidence "is not ours," but "primarily" that of the court of appeals. "This Court will intervene only in what ought to be the rare instances where the standard appears to have been misapprehended or grossly misapplied." *Mobile Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

In the instant action, the Eleventh Circuit properly evaluated the factual issues and concluded the following:

> "The threshold inquiry is whether section 27-523 of Tampa's City Code applies to the alleged activities occurring at 2312 West Farwell Drive. Because of the way we answer that inquiry, it will not be necessary for us to analyze the thorny constitutional issues presented in this case.
>
> "Section 27-523 defines adult entertainment establishments as [a]ny premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual

> activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section." 265 F.3d 1232, 1235 (11th Cir. 2001).

After identifying the inquiry, the Eleventh Circuit cut through the City's attempt to cloud the facts with innuendo, and properly concluded as follows:

> "In opposition, Voyeur Dorm argues that it is not an adult use business. Specifically, Voyeur Dorm contends that section 27-523 applies to locations or premises wherein adult entertainment is actually offered to the public. Because the public does not, indeed cannot, physically attend 2312 West Farwell Drive to enjoy the adult entertainment, 2312 West Farwell Drive does not fall within the purview of Tampa's zoning ordinance. We agree with this argument.
>
> "The residence of 2312 West Farwell Drive provides no "offer[ing] [of adult entertainment] to members of the public." The offering occurs when the videotaped images are dispersed over the internet and into the public eye for

consumption. The City Code cannot be applied to a location that does not, itself, offer adult entertainment to the public. As a practical matter, zoning restrictions are indelibly anchored in particular geographic locations. Residential areas are often cordoned off from business districts in order to promote a State's interest. *See, e.g., City of Renton, 475 U.S. at 50, 106 S.Ct. 925* ("A city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."). It does not follow, then, that a zoning ordinance designed to restrict facilities that offer adult entertainment can be applied to a particular location that does not, at that location, offer adult entertainment. Moreover, the case law relied upon by Tampa and the district court concerns adult entertainment in which customers *physically attend* the premises wherein the entertainment is performed. *[FN2]* Here, the audience or consumers of the adult entertainment do not go to 2312 West Farwell Drive or congregate anywhere else in Tampa to enjoy the entertainment. Indeed, the public offering occurs over the Internet in "virtual space." *[FN3]* While the district court read section 27-523 in a literal sense, finding no requirement that the paying public be *on the premises*, we hold that section 27-523 does not apply to a residence at which there is no public offering of adult entertainment. Accordingly, because the district court misapplied section 27-523 to the residence of 2312 West Farwell Drive, we reverse the district court's order granting summary judgment to Tampa. Since the resolution of this threshold issue obviates the need for further analysis, we do not reach the remaining issues regarding the constitutionality of

Tampa's zoning restrictions as applied to Voyeur Dorm.

"*FN2.* The body of case law applying legislative restrictions to adult entertainment establishments relies on adverse effects that debase adjacent properties. *See, e.g., City of Erie v. Pap's A.M., 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000)* (relying on the negative secondary effects doctrine to uphold a city's ordinance as applied to an erotic dancing establishment); *City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)* (upholding a zoning ordinance that prohibited adult motion picture theaters from operating in certain locations based upon the negative secondary effects created by such theaters); *Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)*; *Flanigan's Enter., Inc. v. Fulton County, 242 F.3d 976 (11th Cir.2001)* (holding that a local ordinance failed to further the county's purported concern with negative secondary effects and was thus unconstitutionally applied); *Ward v. County of Orange, 217 F.3d 1350 (11th Cir.2000)*; *Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir.1998)*; *Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir.1985).*

"*FN3. See Reno v. ACLU, 521 U.S. 844, 851, 117 S.Ct. 2329, 2334, 138 L.Ed.2d 874 (1997)* (stating that internet communication is "a unique medium — known to its users as 'cyberspace' — located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet")." *Id.* at 1236, 1237.

As a reasoned and impartial analysis of the above statements clearly shows, the Eleventh Circuit decision does not, in any way, as the Petitioner states "conflict with the decisions of the United States Supreme Court ... ."

3. The Decision of the Eleventh Circuit Does Not "Read Language" Into the City Code's Definition of an Adult Entertainment Establishment, It Simply Applies the Appropriate Law to the Facts And Reverses the Absurd Result Urged by Petitioner and Misguidedly Embraced by the District Court.

In their Petition, the City essentially suggests that the "literal" application of the language of the City Code must operate as a complete and total obstacle to the application of appropriate judicial reasoning. Acceptance of the City's position would render its adult use ordinance unconstitutional and void under the overbreadth doctrine, since every hotel room in which motion pictures of even the mildest sexually explicit nature were offered would *per se* then be an adult entertainment establishment. Clearly, this position does not advance any governmental interest and would leave no other conclusion than the fact that the legislation is not "narrowly tailored," and, thus, even more invalid. Naturally, the City does not concede that the vacuous misapplication and misinterpretation of poorly drafted municipal legislation would set the "secondary effects doctrine" on its ear. Contrary to the superfluous reference to the holding in *Hughes Aircraft Company v. Jacobson*, 522 U.S. 432, 438 (1999), the operative language to focus on should be "As in any case of statutory construction, our analysis *begins* with 'the language of the statute' . . . And where the statutory language provides a clear answer, it ends there as well." *Id* (Emphasis added).

Ultimately, even though an analysis may *begin* with "the language" of any legislation being evaluated, it has *always* been the responsibility and obligation of the courts to avoid any application of statutory language which would manifest an absurd result. For any court to embrace the position urged by the City, the result would clearly be entirely unreasonable and would directly conflict with the unique exception to the unconstitutionality of "content-based" legislation carved out by the "secondary effects doctrine" articulated in *Young v. American Mini Theatres, Inc., supra, City of Renton v. Playtime Theatres, Inc., supra*, and their progeny.

Regardless of any considerations to the contrary, the house at 2312 West Farwell Drive, Tampa, Florida, served primarily as the *residence* of the individuals whose lives were documented therein. It is interesting and important to note that, prior to the direction to seek an "interpretation," from the City of Tampa's Zoning Coordinator, with the subsequent procedural requirement that the appeal of her determination required issuance of a "Notice" to surrounding owners, the address of the subject home was never disclosed to the public in any fashion.

Undeniably, the Zoning Coordinator revealed the flaws in her interpretation by stating that her conclusions regarding the use of the premises were established, not by viewing the premises, but by accessing the website ("the web page can be found by going to Yahoo! and entering voyeur dorm on the search . . ."), inappropriately focusing on *her* belief that the name of the website was "advertising the adult nature of the entertainment," and concluding that "Internet viewers," were able to "monitor" activities occurring at the residence, and further imputing "web page . . . scenes," and other *webpage* statements to be determinative of, not the *webpage*, but of the *home* at 2312 West Farwell Drive, Tampa, Florida.

There was absolutely nothing in the definition of "adult entertainment establishment" of Section 27-523, City of Tampa Code (quoted by the Zoning Coordinator in her letter as the basis for her decision), which authorized the interpolation or extrapolation of information gathered from a website, the name of any such website, or the concept of "advertising," whatsoever, as the basis for any determination that a particular *premises* was or was not an "adult entertainment establishment."

To underscore the absurdity of the result urged by the Petitioner, it is well settled that zoning ordinances which purport to regulate any form of "adult-entertainment" are unconstitutionally "content based" unless it can be shown that any challenged legislation is designed to target the so called "secondary effects" of adult businesses. The first case to address this issue was *Young v. American Mini Theaters, Inc., supra.* The "secondary effects" identified in the *Young* case were based on the belief that the concentration of the businesses sought to be regulated by the City of Detroit in its "anti-skid row" legislation "tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution and encourages residents and businesses to move elsewhere."

The second important case dealing with adult entertainment businesses is the case of *City of Renton v. Playtime Theatres Inc., supra.* Again, the *Renton* case recognized that any zoning restrictions placed on businesses deemed to be "adult entertainment" would be unconstitutionally "content based" unless the zoning ordinance at issue was designed to prevent crime, protect the city's retail trade, maintain property values, and was otherwise the result of "predominate concerns" with the secondary effects of adult businesses and not with the content of adult entertainment itself. A requirement of this concept was

that these adverse secondary effects be established through competent, substantial evidence. *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982).

As this case progressed before the District Court, it was clear that the Respondents herein wished to vigorously contest the validity of the Tampa City Council's "findings" as contained in the "record" allegedly asserted as the justification for the adult entertainment zoning restrictions at issue herein. Notwithstanding the fact that no opportunity to contest any findings "ever existed" relative to challenges before the Council, the Respondents wished to demonstrate that there was a significant doubt as to the validity of the City's "record" and the City Council's findings, particularly as they related to any Internet-based "e-commerce" form of communication. There was no possible way that the characteristics of this form of communication could have been considered in the early 1980s or at any time the City of Tampa considered any such "record," or "secondary effects" concerns.

The inapplicability of entirely unrelated and unsupported concerns with "secondary effects" was rejected in *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000). This case held: "That a legislative body may rely on foreign studies to establish its interest in a regulation does not relieve that entity from the obligation of demonstrating that the study must be "reasonably believed to be relevant to the problem that the City addresses." (*citing Colacurcio v. City of Kent*, 545 (9th Cir. 1998), and clearly evoking the doctrine enunciated in *City of Renton*). The *Alameda Books* case was the subject of a petition for writ of certiorari which was granted by this Court (__ U.S. __, 121 S. Ct. 1223 (2000)), and on which Oral Argument was entertained on December 4, 2001.

Notwithstanding the outcome of this Court's evaluation of the issues in the *Alameda Books* case, to adopt the City of Tampa's position in their Petition for Writ of Certiorari, would stretch the "exceptional" nature of the "secondary effects doctrine" and would clearly manifest the "violence" previously only threatened to the First Amendment by this arguably unproven and dangerously flexible "doctrine" would certainly have come to pass. If this Court were to allow the retroactive application of an arguably "bogus" secondary effects "record" to justify restrictions on a form of speech that *never existed* when that "record" was created, this stretches the "secondary effects doctrine" to beyond the breaking point and, by analogy, would horrify First Amendment advocates since, by its very nature, *pure political speech* could clearly be the catalyst to "adverse secondary effects" in the form of brawls, corruption, and other "non content-based" consequences. *See* David L. Hudson, Jr., *The Secondary Effects Doctrine: the Evisceration of First Amendment Freedoms*, Washburn L.J., Vol. 37, No. 1, 55-94.

Indeed, in upholding the ordinance at issue in *Renton*, this Court held that, "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever *evidence* the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 53, 106 S. Ct. 925, 931 (1986) (Emphasis added).

In at least one Circuit, it was held that:

> "When a legislative body acts to regulate speech, it has the burden, when challenged, of showing either (1) that its actions serves a compelling state interest

> which cannot be served in a less restrictive way, or (2) that its actions serve a substantial content-neutral state interest . . . it must come forward with . . . evidence . . . justifying . . . reasonable time, place and manner restrictions on speech." *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-173 (3rd Cir. 1997).

This Court's requirement that legislative restrictions on free speech be supported by at least some modicum of "evidence" is not new, extreme, nor novel:

> ". . . **[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the first Amendment**. In order for a reviewing court to determine whether a zoning restriction that impinges on free speech is "narrowly drawn [to] further a sufficiently substantial governmental interest," ante, at 68, the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as de minimus . . .
>
> "However, it is not enough for a local government to simply articulate an interest in preventing neighborhood blight; it must be prepared both 'to articulate and support,' a reasoned and significant basis for its zoning decisions." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 67, 101 S.Ct. 2176 (1981) (Blackmun, concurring) (Emphasis added).

> "Here, Kandyland has had ample opportunity to **contest** the council's findings about secondary effects — before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. **In the absence of any reason to doubt it**, the city's expert judgment should be credited." *City of Erie v. Pap's A.M.*, 120 S.Ct. 1382 (2000). (Emphasis added).

To distill the District Court's reasoning down to its "lowest common denominator," it is abundantly clear that the *only* "secondary effect" deemed by the District Court to be similar to those cases discussing the secondary effects doctrine was the sexually explicit nature of the communication at issue. Indeed, the District Court exhibited the same kind of confusion, or reluctance to respect or consider First Amendment protection in the area of sexual expression, that this Court invalidated in *United States v. Playboy Entertainment Group*, __ U.S. __, 120 S. Ct. 1878 (2000), where the section of the Telecommunications Act at issue therein, which required cable television operators who provided sexually oriented channels to either scramble their signals or limit their transmission to hours when children were unlikely to be viewing, was invalidated. This Court ultimately held that trying to stifle the communication at issue on the basis of the "idea" it represented (a "primary" rather than "secondary effect") was totally unacceptable under First Amendment principles.

Equally disturbing is the City's attempt to persuade this Court that the totally irrelevant issue of the residents' "employment" or "compensation" in some way casts doubt on the Eleventh Circuit's decision. The City even goes so far as to include a copy of the agreement between Respondent Autumn Dawn Marenger and Respondent Voyeur Dorm, L.C. in the Appendix to its Petition. The Eleventh Circuit acknowledged this issue and simply disregarded it as the "red herring" it was. The argument asserted by the City is disturbing because, while "strict construction of the language" of the City Code Section at issue is urged on the one hand, the subject City of Tampa Code Section does not *anywhere* mention employment, does not include employment as an "element" of the definition of "adult entertainment establishment," and is silent as to the issue of compensation. Indeed, none of these issues are relevant to the "secondary effects" doctrine, and, as urged previously by the Respondents in the Eleventh Circuit, there are hundreds of examples of situations where people are compensated for "home occupations" (which, in the City of Tampa include cosmetology, hair styling, pet grooming, auto repair, and other "occupations" where members of the public actually present themselves at residential premises) or services performed in residential zoning districts, such as nurses, nannies, maids, or even "telecommuting," where people work and communicate with their offices and others by communicating over the internet, etc., none of which trigger zoning enforcement.

Ultimately, administrative interpretation of legislation is not entitled to deference when it goes beyond the meaning that legislation can bear. *See, e.g., Pittston Coal Group v. Sebben*, 488 U.S. 105, 113, 109 S. Ct. 414, 419-420, 102 L. Ed. 2d 408 (1988). In the instant action, the result urged

by the Petitioner would be directly contrary to the exceptions carved out by the "secondary effects doctrine" and, most certainly, would render the municipal legislation at issue unconstitutional. In addition, the most cogent canon of statutory construction is that the evaluation of legislation must be done in the context of contemporary issues. This Court has held "evaluation of congressional action must take into account its contemporary legal context." *See Morse v. Republican Party of Virginia*, 517 U.S. 186, 116 S. Ct. 1186, 1190, 134 L. Ed. 2d 347 (1996) (plurality opinion) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 698-99, 99 S. Ct. 1946, 1958-59, 60 L. Ed. 2d 560 (1979)); *see also Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A*, 83 F.3d 1317, 1331 (11th Cir. 1996) (en banc) (recognizing principle that "Congress legislates against the background of the existing common law").

Applying these legal principles to this Petition, it is clear that any application of municipal zoning concepts to the "virtual reality" of the internet would result in expanding restrictions on free speech beyond any constitutional limit, and would result in the application of legislation adopted in the context of land use to a situation reflecting a form of communication never even dreamed of when the original legislation was adopted. Such simple minded, arbitrary "lockstep" application of legislation and legal principles would render the law nothing more than a tyrannical exercise, rather than the living and breathing organism that it must be to serve a free society.

CONCLUSION

The questions presented by the Petitioner do not accurately describe either the content or the impact of the Eleventh Circuit decision at issue. There are no issues of exceptional importance that have not already been resolved by this Court and there is nothing about the Eleventh Circuit decision which, in any way, detracts from a municipality's ability to regulate adult businesses through the *appropriate* use of the zoning power. Contrary to the assertions of the Petitioner, the utilization of a "webcam" that records the day-to-day activities of human beings living their lives does not justify the label of "staging and filming adult entertainment 24 hours a day."

This Court has previously evaluated the concepts of free speech in the context of the internet and there is no reason, much less any compelling reason, to revisit this issue in the misguided context of the arguments urged by the Petitioner. For all of the foregoing reasons, the Respondents respectfully request that this Court deny Petitioner, City of Tampa's Petition for a Writ of Certiorari.

Respectfully submitted,

LUKE CHARLES LIROT
Counsel of Record
MARK R. DOLAN
Attorneys for Respondents
112 East Street, Suite B
Tampa, Florida 33602
(813) 221-9533

(3)

No. 01-902

In The

Supreme Court of the United States

CITY OF TAMPA, FLORIDA,

Petitioner,

v.

VOYEUR DORM, L.C., ENTERTAINMENT NETWORK, INC., AUTUMN DAWN MARENGER AND 2D&H, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER IN RESPONSE TO BRIEF IN OPPOSITION

JAMES D. PALERMO, City Attorney
GINA K. GRIMES
Chief Assistant City Attorney
JERRY M. GEWIRTZ
Assistant City Attorney
Counsel of Record
Fifth Floor, City Hall
315 E. Kennedy Blvd.
Tampa, Florida 33602
(813) 274-8996

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. THE JUDGMENT OF THE COURT OF APPEALS IS FINAL AND A MANDATE HAS BEEN ISSUED.

Respondents assert, in their Brief in Opposition, that "A Court of Appeals' judgment or order is not final until issuance of a mandate, at which time the party's obligations become fixed." (Brief in Opp., p. 1-2.) In that regard, it should be noted that on December 10, 2001 the Eleventh Circuit Court of Appeals issued a mandate which states in relevant part:

> **JUDGMENT**
>
> It is hereby ordered, adjudged and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.
>
> Entered: September 21, 2001
> For the Court: Thomas K. Kahn, Clerk
> By: McCombs, Elaine

The judgment, moreover, has imprinted on it the words "ISSUED AS MANDATE DEC. 10, 2001, U.S. COURT OF APPEALS, ATLANTA, GA." (The judgment, issued as a mandate on December 10, 2001, is reproduced at Appendix "A".)

Accordingly, there should be no question that this Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

II. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT WHICH CAUSED THE ELEVENTH CIRCUIT TO REVERSE THE DISTRICT COURT'S ORDER.

Contrary to Respondents' assertion, that the District Court's Order was reversed because there were genuine issues of material fact, the District Court's Order was not reversed because of any genuine issues of material fact.

First of all, an examination of the Eleventh Circuit Opinion clearly reflects that the judgment of the District Court was reversed by the Eleventh Circuit, not because of any genuine issues of material fact, but rather because the Eleventh Circuit made a legal determination (albeit an erroneous legal determination) that the well established case law of the United States Supreme Court – which allows municipalities to keep adult entertainment establishments out of residential neighborhoods – is inapplicable to the staging and filming of adult entertainment on a residential premises where the adult entertainment is commercially transmitted over the internet to paying subscribers who may view the adult entertainment without physically attending the residential premises wherein the adult entertainment is being staged and filmed. This is strictly a legal issue and does not implicate any factual issues.

Secondly, it is important to note that there were no genuine issues of material fact as it related to the City's Motion for Final Summary Judgment. Indeed, the City – in support of its Motion for Final Summary Judgment – filed a separate "Statement of Undisputed Facts in Support of the City's Motion for Final Summary Judgment"; and the Respondents *never* filed a separate "Statement of

Disputed Facts," with citations to the record, disputing those facts in support of the City's Motion for Final Summary Judgment. In that regard, the Case Management and Scheduling Order issued by the District Court expressly provided that, "to the extent that the party opposing a motion for summary judgment disputes any facts asserted in the motion, a separate 'Statement of Disputed Facts,' with citations to the record, shall accompany the memorandum in opposition"; and the Case Management and Scheduling Order further provided that "all material facts set forth by the moving party *shall be deemed admitted* unless controverted by a separate Statement of Disputed Facts." (Emphasis supplied.) Accordingly, insofar as Respondents *never* filed a separate Statement of Disputed Facts, with citations to the record, all material facts set forth in the "City's Statement of Undisputed Facts in Support of the City's Motion for Final Summary Judgment" must be deemed admitted. (The "City's Statement of Undisputed Facts in Support of the City's Motion for Final Summary Judgment" is reproduced at Appendix "B".)

III. THE CITY IS NOT REGULATING THE INTERNET; RATHER THE CITY IS SIMPLY REGULATING THE LOCATION OF AN ADULT USE BUSINESS.

Contrary to the Respondents' suggestion, that the City is attempting to regulate the internet, it must be emphasized that the City is *not* regulating the content of speech or any other form of communication that is being disseminated over the internet; rather, the City is simply seeking to regulate the *location* of an adult use business.

In that regard, the Respondents may commercially broadcast adult entertainment over the internet 24 hours a day, 7 days a week; the City is merely seeking to regulate the *location* from where the adult entertainment is being staged and filmed such that it does not occur in a residential neighborhood.[1] Indeed, the record is clear that the Respondents may stage and film adult entertainment in other locations throughout the City[2] and the adult entertainment may be commercially broadcast over the internet 24 hours a day, 7 days a week.

The distinction between regulating the content of speech, and regulating the *location* of an adult use, has been recognized by the Supreme Court in a number of cases including *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) wherein the Supreme Court observed that "In *Renton*, we upheld a zoning ordinance that kept adult movie theatres *out of residential neighborhoods*. The ordinance was aimed, not at the content of the films . . . but rather at the 'secondary effects' . . . *It is th[e] secondary effect which the zoning ordinances attempt to avoid, not the dissemination of 'offensive speech.'* " *Reno*, 521 U.S. at 867 (emphasis supplied) (quoting *Renton*, 475 U.S. at 49) (quoting *American Mini Theatres*, 427 U.S. at 71 n.34).[3]

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[1] Under the City Code, adult uses are not permitted in a district zoned RS-60 Residential Single Family.

[2] Pursuant to the City Code, adult uses are permitted in the CI, IG and IH districts.

[3] It should further be noted that in *Reno*, unlike the case *sub judice*, the legislation at issue – the Communications Decency Act ("CDA") – imposed a "content-based blanket restriction on speech." 521 U.S. at 868. Moreover, the Supreme Court in *Reno* observed that "the purpose of the CDA is to protect children

Similarly, in the case at bar, the zoning ordinance is not aimed at the content of any speech but rather at the adverse secondary effects which the zoning ordinance attempts to avoid.[4]

Finally, the Respondents' citation to *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) is distinguishable and inapposite. In *Playboy Entertainment Group, Inc.*, the legislation at issue – the Telecommunications Act – imposed content-based restriction on speech whereas, in the matter at hand, the legislation at issue is wholly unrelated to the suppression of free expression. Indeed, the case *sub judice*, unlike *Playboy Entertainment*, merely involves regulating the *location* of an adult use

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from the primary effects of 'indecent' and 'patently offensive' speeeh rather than any 'secondary' effect of speech. Thus, the CDA is a content-based blanket restriction on speech and, as such, cannot be 'properly analyzed as a form of time, place and manner regulation.' " *Id.* at 868 (quoting *Renton*, 475 U.S. at 46.) In contrast, in the case *sub judice*, the City's zoning ordinance is unrelated to the suppression of free expression and merely regulates the *location* of adult uses which is a zoning issue.

[4] In that regard, the record below reflects that City Council was concerned about the adverse secondary effects of adult uses and was attempting to combat those secondary effects. Moreover, there is evidence in the record of adverse secondary effects in the residential neighborhood from the adult entertainment being staged and filmed at the residential premises. Indeed, the City's Petition for Writ of Certiorari discusses, at page 15, some of the adverse secondary effects which are associated with adult entertainment businesses in residential neighborhoods which may be found in the record below.

which is a zoning issue.[5] The City is not attempting to regulate the content of any speech or any other form of communication that is being disseminated over the internet.

IV. THE ISSUES PRESENTED ARE OF EXCEPTIONAL IMPORTANCE AND OF NATIONAL SIGNIFICANCE.

Contrary to the Respondents' assertion, that there are no issues of exceptional importance and that there is nothing about the Eleventh Circuit decision which in any way detracts from a municipality's ability to regulate adult businesses, this case is of exceptional national significance and the decision by the Eleventh Circuit does impair the City's ability to regulate adult businesses. Indeed, the Eleventh Circuit decision flies in the face of the well established case law of the United States Supreme Court which allows municipalities to keep adult

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[5] In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), where the Supreme Court rejected the argument that the regulation of the location of an adult use constituted suppression of free expression, the Supreme Court stated in relevant part:

> *Renton* has not used the 'power to zone as a pretext for suppressing expression' . . . but rather has sought to make some areas available for adult theatres and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theatres from locating in other areas. *This, after all, is the essence of zoning.*

475 U.S. at 54. (Emphasis supplied.)

entertainment establishments out of residential neighborhoods. *See City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

It should further be noted that, contrary to the Brief in Opposition, the Supreme Court has never held that the technological development of the internet has undermined, or made inapplicable, the well established case law of this Court which allows municipalities to keep adult entertainment establishments out of residential neighborhoods. Moreover, the Supreme Court has never held that the ability of patrons to view adult entertainment through the internet, without physically attending the residential premises wherein the adult entertainment is being staged and filmed, has impaired a municipality's ability to regulate the location of an adult use business where the adult entertainment is being staged and filmed on a residential premises.

Finally, this case is of national significance for the reason that the failure of this Court to address the questions set forth in the Petition for Writ of Certiorari may result in the proliferation of adult entertainment establishments – staging and filming adult entertainment 24 hours a day – in residential neighborhoods throughout the country and thereby creating adverse secondary effects in the residential neighborhoods where the adult entertainment is being staged and filmed.

CONCLUSION

For all of the aforesaid reasons, it is respectfully requested that this Court grant the Petition for Writ of Certiorari and resolve the vital questions which are the subject of the Petition.

DATED: February 4, 2002.

Respectfully submitted,

JAMES D. PALERMO, City Attorney
GINA K. GRIMES
Chief Assistant City Attorney
JERRY M. GEWIRTZ
Assistant City Attorney
Counsel of Record
Fifth Floor, City Hall
315 E. Kennedy Blvd.
Tampa, Florida 33602
(813) 274-8996

Attorneys for Petitioner

APPENDIX A

United States Court of Appeals
For the Eleventh Circuit

No. 00-16346

District Court Docket No.
99-02180-CV-T-24F

VOYEUR DORM, L.C., a Florida limited liability company, ENTERTAINMENT NETWORK, INC., a Florida corporation, AUTUMN DAWN MARENGER, 2D&K, INC.,

Plaintiffs-Appellants,

DAN MARSHLACK, SHARON GOLD MARSHLACK,

Plaintiffs,

versus

CITY OF TAMPA, FL, a Florida municipal corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

(Filed Sep. 21, 2001)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: September 21, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

[ISSUED AS MANDATE

DEC 10 2001

U.S. COURT OF APPEALS
ATLANTA, GA]

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

VOYEUR DORM, L.C., ET AL.

Plaintiffs,

vs.

THE CITY OF TAMPA, FLORIDA,

Defendant.
_____/

This pertains to a dispositive Motion

CASE NO. 99-2180-CIV-T-24F

DEFENDANT, CITY OF TAMPA'S, STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF CITY'S MOTION FOR FINAL SUMMARY JUDGMENT

It is the position of the Defendant, City of Tampa ("City"), that the following facts – which are supported with citations to the record – should not be disputed:

1. On January 29, 1999 Plaintiffs' counsel, Mark Dolan, sent a letter to the City's Zoning Coordinator requesting her interpretation of the City Code as it applied to the activities occurring at 2312 West Farwell Drive, Tampa, Florida ("the premises").[1]

[1] A copy of this letter is attached to the Complaint as Exhibit "A" and is also contained within the certified documents of which the Court took judicial notice in the Order of November 2, 1999.

2. On February 12, 1999 the City's Zoning Coordinator, Gloria Moreda, responded to the aforesaid letter and stated in relevant part:

> The following generally describes the activities occurring on the property:
>
> 1. 5 unrelated women are residing on the premise.
>
> 2. 30 internet cameras are located in various rooms in the house; such as the bedrooms, bathrooms, living rooms, shower, & kitchen.
>
> 3. For a fee, internet viewers are able to monitor the activities in the different rooms.
>
> 4. The web page address is http://www.voyeurdorm.com/
>
> 5. The web page shows various scenes from the house, including a woman with an exposed buttocks. Statements on the page describe activities that can be viewed such as 'The Girls, of Voyeur Dorm are fresh, naturally erotic and as young as 18. Catch them in the most intimate acts of youthful indiscretion'.
>
> The web page can be found by going to Yahoo! and entering 'Voyeurdorm' on the search. The name of the web site is, itself, advertising the adult nature of the entertainment. Voyeur is defined in the *American Heritage Dictionary*, Second College Edition as 'A person who derives sexual gratification from observing the sex organs or sexual acts of others, especially from a secret vantage point'.

It is my determination that the use occurring at 2312 W. Farwell Dr., as described in your letter, is an adult use. Section 27-523 defines adult entertainment as:

> Any premises, except those businesses otherwise defined in this chapter, on which is offered to members of the public or any person, for a consideration, entertainment featuring or in any way including specified sexual activities, as defined in this section, or entertainment featuring the displaying or depicting of specified anatomical areas, as defined in this section; 'entertainment' as used in this definition shall include, but not be limited to, books, magazines, films, newspapers, photographs, paintings, drawings, sketches or other publications or graphic media, filmed or live plays, dances or other performances either by single individuals or groups, distinguished by their display or depiction of specified anatomical areas or specified sexual activities, as defined in this section.

Please be aware that the property is zoned RS-60 Residential Single Family and an adult use business is not a permitted use. You should advise your client to cease operation at that location.[2]

3. On or about April 12, 1999 Dan and Sharon Gold Marshlack[3] appealed the Zoning Coordinator's decision

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[2] A copy of the February 12, 1999 letter is contained within the certified documents of which Judge Bucklew has taken judicial notice pursuant to her Order of November 2, 1999.

[3] Dan and Sharon Gold Marshlack were originally parties to this action. On or about May 4, 2000 Plaintiffs filed an

to the City's Variance Review board. According to the Statement of Administrative Appeal filed by Mr. and Mrs. Marshlack, the section of the City Code which was appealed was "Section 27-523 as interpreted by Gloria Moreda, Zoning [Coordinator], in her letter of February 12,-1999."[4]

4. On July 13, 1999 an appellate hearing was held before the City's Variance Review Board. At that hearing, Dan and Sharon Gold Marshlack were represented by Plaintiffs' counsel, Mark Dolan, who conceded the following salient points at the July 13, 1999 hearing: that five women live in the house and there are cameras in the corners of all of the rooms of the house (n.t. 12); that "[f]or a fee you can join a membership to a web site wherein you can see them living 24 hours, seven days a week" (n.t. 12); that "[w]e do not take exception to the administrator's determination that, in fact, at times you can see someone disrobed over the Internet" (n.t. 12-13); that "the ladies receive free room and board, they get tuition to go to school and they do receive a stack amount" (n.t. 27-28); that "they are on 24 hours, seven days a week, so . . . from that perspective it is a performance . . . much like real TV or MTV" (n.t. 28); that "nudity . . . exists . . . there's no denying that" (n.t. 28);

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unopposed Motion to substitute 2D&H, Inc. for Dan and Sharon Gold Marshlack and said Motion was granted by the Court.

[4] The Statement of Administrative Appeal is attached to the Complaint as Exhibit "C" and contained within the certified documents of which the Court took judicial notice on November 2, 1999.

and that we "would not dispute that there is an enterprise going on, that these women are being paid, and you can see them over the Internet" (n.t. 30). At the conclusion of the hearing, the Variance Review Board voted unanimously to uphold the Zoning Coordinator's determination in this matter that the use occurring at 2312 West Farwell is an adult use.[5]

5. On July 18, 1999 Dan and Sharon Gold Marshlack filed an appeal from the decision of the Variance Review Board to the City Council. According to the appeal form filed by Plaintiffs Dan and Sharon Marshlack, the reason for appealing this decision was that the Zoning Coordinator failed to comply with the essential requirements of the law in her interpretation of §27-523 as applied to the facts.[6]

6. On August 26, 1999 an appellate hearing was held before Tampa City Council in this matter. At that hearing, Dan and Sharon Marshlack were once again represented by attorney Mark Dolan. Plaintiffs' counsel did not dispute, at the hearing, that there is a fee charged for viewing the women of the Voyeur Dorm; that the women are in fact disrobed; that they are part of a business enterprise; that Plaintiffs' counsel had requested an

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[5] A copy of the transcript from the Variance Review Board hearing is attached to the Complaint as Exhibit "D" and is contained within the certified documents of which the Court took judicial notice on November 2, 1999.

[6] A copy of the Appeal Form filed by Mr. and Mrs. Marshlack is attached as Exhibit "F" to the Complaint and contained within the certified documents of which the Court took judicial notice on November 2, 1999.

occupational license; and that these women were being paid. (See pages 19-20 of the transcript from the City Council hearing wherein Andrea Zelman, counsel for the Variance Review Board, summarized the factual testimony from the hearing before the Variance Review Board.) Indeed, Plaintiffs' counsel conceded that "I do not take any dispute with the facts that have been presented. I think what Ms. Zelman and Ms. Moreda said were correct regarding the facts." (See page 24 of transcript from City Council hearing.)[7] At the conclusion of the hearing, City Council voted unanimously to affirm the decision of the Variance Review Board which had upheld the determination of the Zoning Coordinator.[8]

7. The within action was filed in federal court by Plaintiffs on or about September 24, 1999.

8. The parties thereafter filed a Request that the Court Take Judicial Notice of certified documents and, on or about November 2, 1999, this Court granted the Request that the Court Take Judicial Notice of the documents filed by the parties.

9. The premises is located in a district zoned RS-60 Residential Single Family.[9]

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[7] A copy of the City Council transcript is attached to the Complaint as Exhibit "G".

[8] See page 30 of City Council transcript, attached as Exhibit "G" to Complaint.

[9] Exhibit "C" to the Complaint, which was executed by the property owners, Dan and Sharon Gold Marshlack, expressly identified the zoning district as RS-60. The Zoning Coordinator also confirmed this fact at her deposition. (See page 122 of Moreda deposition.) Moreover, Plaintiffs have admitted this fact

10. Approximately 25 to 30 different women have been employed at the premises.[10]

11. Voyeur Dorm, L.C. officially began its business operations in or about October, 1998 although Mr. Hammil (the Vice President of Entertainment Network, Inc.) believes that women were employed at the premises a few months prior thereto.[11]

12. Entertainment Network, Inc. is a managing member of Voyeur Dorm, L.C.[12]

13. The women that are employed at the premises appear on the Internet based web site voyeurdorm.com which is transmitted to subscribers 24 hours a day, seven days a week.[13]

14. The Plaintiff, Autumn Marenger, and other women employed at the premises, entered into Employment Agreements with Voyeur Dorm, L.C.[14] which provide, in general terms, that:

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in response to the City's First Request for Admissions in paragraph 2.

[10] See Hammil deposition, page 103.

[11] See Hammil deposition, page 46-47.

[12] See Complaint, paragraph 7; Hammil deposition, page 9.

[13] Marenger deposition, page 15; Freudigman deposition, page 7; West deposition, page 20; Martin deposition, page 6.

[14] The June 1, 1999 Employment Agreement between Plaintiff Autumn Marenger and Plaintiff Voyeur Dorm, L.C. is contained within deposition exhibit #53. (Marenger deposition, pages 435, 436, 469-471.) Employment Agreements, containing the same terms, were also executed by numerous other employees at the premises including, but not limited to, Tamara Freudigman (Freudigman deposition, pages 306-333), Ashley West (West deposition pages 37-56), Heather Martin (Martin

(a) In consideration of employee allowing Voyeur Dorm to commercially photograph and broadcast the images and likeness of employee, live over the Internet 24 hours a day, 7 days a week, Voyeur Dorm agreed to provide benefits to employee, as set forth in the Agreement, including providing compensation to employee and allowing employee to occupy and use a furnished bedroom and all common areas at the premises. (See last whereas clause on page 1 of the June 1, 1999 Employment Agreement; and paragraphs 2, 11 and 21 of the June 1, 1999 Employment Agreement.) (See Hammil deposition, page 78-87.)

(b) Employee acknowledged that the premises are, in addition to being the residence of employee, a stage and filming location for commercial internet broadcasting of the day to day activities of employee and other fellow employees 24 hours per day, 7 days a week. (See paragraph 9 of the June 1, 1999 Employment Agreement; Hammil deposition, pages 80-81.)

(c) Employee was prohibited from altering, moving or in any way interfering with the location or operation of the cameras at the premises. (See paragraph 10A of the June 1, 1999 Employment Agreement; Hammil deposition, page 81.)

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deposition, pages 30-60), Tiffany Angeli (Hammil deposition, pages 90-91), Nicole Hooper (Hammil deposition, page 94), Jennifer Jordan (Hammil deposition, page 95) and Kelly Permenter (Hammil deposition, pages 96-97). These Employment Agreements are contained within deposition exhibits 75, 82, 89, 131, 132, 133 and 134, respectively.

(d) Employee agreed to devote a number of hours per day, as set forth in the Agreement, to on-camera activities identified in the Agreement including, but not limited to, chatting, tanning, swimming, dressing, theme parties, special events, personal grooming and ablutions. (See paragraph 22 of the June 1, 1999 Employment Agreement; Hammil deposition, page 84.) (The word "ablution" is defined by Webster's Collegiate Dictionary, Tenth Edition, to mean "the washing of one's body or part of it;" and "the act or action of bathing." The employees that were deposed further testified that they understood the word "ablution" to mean bathing or showering. See Marenger deposition, pages 455-456; Freudigman deposition, page 317; West deposition, page 47; Martin deposition, pages 38-39.)

(e) Employee acknowledged that she had no reasonable expectation of privacy while on the premises and agreed to having her images and likeness commercially broadcast by Voyeur Dorm live over the Internet 24 hours a day, seven days a week. (See paragraph 27 of the June 1, 1999 Employment Agreement; Hammil deposition, page 87.)

(f) Employee agreed that she was not a tenant and waived any rights that she may have as a residential tenant. (See paragraph 28 of the June 1, 1999 Employment Agreement; Hammil deposition, page 87.)

(g) Employee authorized Voyeur Dorm to deduct specified sums from her weekly salary for, *inter alia*, unauthorized absence from the premises, unauthorized absence from chat, failure to participate in activities set

forth in the Agreement and covering or moving of cameras. (See Exhibit B to Employment Agreement; Hammil deposition, page 88.)

(h) Employee could be terminated at will whereupon employee would be required to immediately remove her personal property and leave the premises. (See paragraph 1 of the Employment Agreement; Hammil deposition, page 81.)

(i) Employee was not permitted or allowed any guests on the premises without the prior written consent of the Voyeur Dorm. (See paragraph 8 of the Employment Agreement; Hammil deposition, page 80.)

15. The Voyeur Dorm Employee Handbook provides, in general terms, that living in the Dorm is to be viewed as a full time job; that the women employed at the premises are required to work 5 days with 2 days off; that no one under the age of 18 is permitted on the premises; and that all friends must sign a disclosure prior to entering the premises.[15]

16. Voyeurdorm.com does not transmit any audio from the premises. (Marenger deposition, page 47; Freudigman deposition, pages 385-386.)

17. The Regulations of Voyeur Dorm, L.C., which was executed in or about October, 1998, provide in general terms that the business of the company included the operation of the premises for entertainment purposes (see paragraph 1.3 of Regulations of Voyeur Dorm, L.C.); and

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[15] See pages 2 and 6 of the Voyeur Dorm Employee Handbook which was marked as deposition exhibit #49.

that Entertainment Network, Inc. would supervise the production of the content including the hiring and firing of talent and performers. (See paragraph 3.3(1) of the Regulations of Voyeur Dorm, L.C.)[16]

18. The women that are employed at the premises, and appear on voyeurdorm.com, are compensated for their services as follows: they receive a weekly paycheck of approximately $400-$700 per week; plus health insurance; plus dental insurance; and free local phone service.[17] The employees also receive occasional bonuses.[18] The employees also receive free room and board.[19]

19. The women employed at the premises physically receive their paychecks at the premises.[20]

20. The subscribers to voyeurdorm.com pay $34.95 per month to watch the women employed at the premises.[21] In addition, subscribers pay an additional monthly fee of $16.00 to "chat" with the women employed at the premises.[22]

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[16] The Regulations of Voyeur Dorm, L.C., is marked as deposition exhibit #129. See also Hammil deposition, pages 53-66.

[17] Hammil deposition, pages 264-266; Marenger deposition, page 82-84; Freudigman deposition page 102-104.

[18] Hammil deposition, page 265; Marenger deposition, page 83; Freudigman deposition, page 102-104.

[19] Marenger deposition, page 84; Freudigman deposition, page 102-104.

[20] Hammil deposition, page 264; Marenger deposition, page 82; Freudigman deposition, page 103.

[21] Hammil deposition, pages 182, 183.

[22] Hammil deposition, page 182, 183.

21. Plaintiffs' counsel conceded at the Variance Review Board hearing that "it is a performance much . . . like Real TV or MTV."[23]

22. Plaintiffs' counsel, Mark Dolan, conceded on a videotape, that was produced by Plaintiffs to the City, that there is an aspect of the business operation going on at the premises.[24]

23. Plaintiff, Autumn Marenger, admitted at her deposition that she believed there is an aspect of a business operation going on at the premises.[25]

24. Women employed at the premises understood that they were providing entertainment for the subscribers of voyeurdorm.com.[26]

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[23] See page 28 of transcript of Variance Review Board hearing which is attached as Exhibit "D" to the Complaint.

[24] Marenger deposition, page 373-374.

[25] Marenger deposition, page 375.

[26] Ms. Freudigman testified that the display of uncovered female breasts, buttocks and pubic region were intended to entertain subscribers of voyeurdorm.com (Freudigman deposition, page 341); that each of the theme parties were intended to entertain subscribers of voyeurdorm.com (Freudigman deposition, page 301); that when she masturbated on camera at the premises that she did so to entertain the subscribers of voyeurdorm.com, (Freudigman deposition, page 342); and that she understood a number of the subscribers subscribed for the very purpose of watching specified sexual activity and specified anatomical areas, (Freudigman deposition, page 194). Ms. West testified that she understood subscribers were entertained when she masturbated on camera (West deposition, page 69, 70, 71); she further testified that the theme parties – which included a tattooing party, a pudding wrestling party, a cigar party, numerous lingerie parties, a body

25. Women employed at the premises characterized themselves as Internet models.[27]

26. A number of documents produced by Plaintiffs characterize the female employees as "Internet models."[28]

27. Voyeurdorm.com web pages, produced by Plaintiffs, state that "we like to call this a 24 hour live interactive TV show with some sexy nudity;"[29] that "the material Voyeur Dorm presents is of an explicit, sexual nature;"[30] and that you are about to purchase access to an adult oriented site. (The voyeurdorm.com web pages which refer to the site as being "adult oriented" are contained within deposition exhibit #84, pages 47 and 49.)

28. Charles Bruce Hammil, the Vice-President of Entertainment Network, Inc., has also affirmatively

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painting party, a human sundae party and a taffy party – were played live and then replayed for the purpose of entertaining subscribers (West deposition, pages 72-83). Ms. Martin also testified that each of the theme parties were played live on voyeurdorm.com and replayed on at least several occasions and that the intent was to entertain the subscribers. (Martin deposition, pages 83-84).

[27] Freudigman deposition, page 111, page 333; West deposition, page 55, 56, 58; Martin deposition; page 58; Hammil deposition, page 99.

[28] *Id.*

[29] The voyeurdorm.com web page in question is part of deposition exhibit #48, page 3.

[30] The voyeurdorm.com web page in question is part of deposition exhibit #84, page 3.

acknowledged that this is a 24 hour live interactive TV show with some sexy nudity.[31]

29. Keith Schram, the Assistant Manager in the business Tax Division for the City, testified that a business was being operated on the premises.[32]

30. One of the job responsibilities of women employed at the premises includes showering or bathing on camera.[33] During the course of showering or bathing on camera, the women's uncovered breasts, uncovered buttocks and uncovered pubic region were exposed to the cameras at the premises;[34] and that activity was intended to be displayed to the subscribers of voyeurdorm.com.[35]

31. One of the job responsibilities of women employed at the premises includes tanning on cameras.[36] During the course of tanning on camera, the women's uncovered breasts, uncovered buttocks and/or uncovered pubic region were exposed to the cameras at the

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[31] Hammil deposition, page 307.

[32] See Schram deposition, page 63-85.

[33] Marenger deposition, page 456-457; Freudigman deposition, page 77-78, 334; West deposition, page 60.

[34] Marenger deposition, page 103, 105, 36, 37; Freudigman deposition, page 155, 164, 334; West Deposition, page 60-61.

[35] Marenger deposition, page 36, 37, 103, 105; Freudigman deposition, page 155, 164, 334; West Deposition, page 60-61.

[36] Marenger deposition, page 455; Freudigman deposition, page 77, 164, 335; West Deposition, page 61.

premises[37]; and that activity was intended to be displayed to the subscribers of voyeurdorm.com.[38]

32. One of the job responsibilities of women employed at the premises includes chatting on camera with the subscribers.[39] During the course of chatting on camera, the women's uncovered breasts, uncovered buttocks and/or uncovered pubic region were exposed to the cameras at the premises;[40] and that activity was intended to be displayed to the subscribers of voyeurdorm.com.[41]

33. One of the job responsibilities of women employed at the premises includes swimming on camera.[42] During the course of swimming on camera, the women sometimes swam without a top on and their uncovered breasts were exposed to the cameras at the

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[37] Marenger deposition, page 103-108; Freudigman deposition, page 155-156, 164-165, 335; West Deposition, page 61.

[38] Marenger deposition, page 103-108; Freudigman deposition, page 155-156, 164-165, 335; West Deposition, page 61.

[39] Marenger deposition, page 453; Freudigman deposition, page 76, 335; West Deposition, page 61-62.

[40] Marenger deposition, page 103-108; Freudigman deposition, page 172-173, 335; West Deposition, page 62.

[41] Marenger deposition, page 103-108; Freudigman deposition, page 172-173, 335-336; West Deposition, page 62.

[42] Marenger deposition, page 455; Freudigman deposition, page 77, 337; West Deposition, page 64.

premises;[43] and that activity was intended to be displayed to the subscribers of voyeurdorm.com.[44]

34. One of the job responsibilities of women employed at the premises includes changing their clothes on camera.[45] During the course of changing their clothes on camera, the women's uncovered breasts, uncovered buttocks and uncovered pubic region were sometimes exposed to the cameras at the premises;[46] and that activity was intended to be displayed to the subscribers of voyeurdorm.com.[47]

35. One of the job responsibilities of women employed at the premises includes participating in theme parties and special events on camera including lingerie parties,[48] body painting parties,[49] human sundae

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[43] Marenger deposition, page 514-515, 487; Freudigman deposition, page 259-260, 337-338; West Deposition, page 64.

[44] Marenger deposition, page 514-515, 494; Freudigman deposition, page 260, 337-338; West Deposition, page 64.

[45] Marenger deposition, page 456; Freudigman deposition, page 77, 165-171, 338; West Deposition, page 72.

[46] Marenger deposition, page 103-108; Freudigman deposition, page 158, 165, 171, 338; West Deposition, page 72.

[47] Marenger deposition, page 103-108; Freudigman deposition, page 158, 165, 171, 172, 338; West Deposition, page 72.

[48] Freudigman deposition, page 282-291, 296, 338; West Deposition, page 73, 75, 76; Wright deposition, page 100, 102, 157-166.

[49] Marenger deposition, page 455, 458-459, 461; Freudigman deposition, page 294, 338; West Deposition, page 76; Wright deposition, page 102, 155-156.

parties,[50] a taffy party,[51] a pudding wrestling party,[52] tattooing and piercing parties[53] and a cigar party.[54] During the course of participating in theme parties and special events the women's uncovered breasts, uncovered buttocks and/or uncovered pubic region were exposed to the cameras at the premises;[55] and that activity was intended to be displayed to the subscribers of voyeurdorm.com.[56]

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[50] Marenger deposition, page 455, 486-488, 495, 496; Freudigman deposition, page 294-295, 338; West Deposition, page 73, 76; Wright deposition, page 102.

[51] Marenger deposition, page 455, 461-462; 497-498; Freudigman deposition, page 295, 338; West Deposition, page 76; Wright deposition, page 102.

[52] Freudigman deposition, page 294, 338; West Deposition, page 73, 76; Wright deposition, page 102; Martin deposition, page 75.

[53] Freudigman deposition, page 294, 338; West Deposition, page 76; Wright deposition, page 102.

[54] Freudigman deposition, page 294, 339; West deposition, page 76.

[55] Marenger deposition, page 276, 280, 304, 305, 359, 362, 458-462, 487-488, 495-498; Freudigman deposition, page 162, 169, 170, 213-219, 245, 253, 264, 265, 266, 274, 275, 276, 277, 286, 287, 288, 291, 292, 339; West Deposition, page 77-82; Wright deposition, page 155-166.

[56] Marenger deposition, page 458-462, 494-498; Freudigman deposition, page 163, 169, 170, 247, 250, 264, 265, 266, 277, 278, 279, 285, 283, 300, 339; West Deposition, page 82; Wright deposition, pages 155-166; Martin deposition, pages 74-84. Ms. Freudigman testified, moreover, that she personally observed some of these theme parties played on voyeurdorm.com (Freudigman deposition, pages 237, 240 and 247.) Ms. West testified, moreover, that the theme parties – above and beyond being displayed live over voyeurdorm.com –

36. The women employed at the premises were required to sleep on camera with night vision cameras on them;[57] and on some occasions some of the women slept without a top on and their uncovered breasts were exposed to the cameras at the premises[58] and intended to be displayed to the subscribers of voyeurdorm.com.[59]

37. The women employed at the premises sometimes walk around the premises with their uncovered breasts, buttocks, genitals and/or pubic region exposed to the cameras at the premises;[60] and that activity was intended to be displayed to the subscribers of voyeurdorm.com.[61]

38. The women employed at the premises sometimes went to the bathroom on camera at the premises.[62] On those occasions when the women went to the bathroom on camera, their uncovered breasts, uncovered

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were also replayed on the surprise cam. (West deposition, pages 92-93, 156.)

[57] Freudigman deposition, page 165-167, 339; West Deposition, page 84.

[58] Marenger deposition, page 105; Freudigman deposition, page 165-167, 339.

[59] Marenger deposition, page 105; Freudigman deposition, page 165-167, 339; West Deposition, page 84.

[60] Marenger deposition, page 103-108; Freudigman deposition, page 160, 168-169, 172, 339; West Deposition, page 86.

[61] Marenger deposition, page 103-108; Freudigman deposition, page 160-161, 168-169, 172, 339; West Deposition, page 86.

[62] Marenger deposition, page 103-108; West Deposition, page 86.

pubic region and/or uncovered buttocks were sometimes exposed to the cameras at the premises;[63] and that activity was intended to be displayed to the subscribers of voyeurdorm.com.[64]

39. The Plaintiff, Autumn Marenger, admitted at her deposition that when she took care of personal hygiene matters at the premises that her genitals, pubic region and buttocks were exposed to the cameras and displayed over the Internet;[65] that when she slept her genitals, pubic region and buttocks were on some occasions exposed to the cameras and displayed over the Internet;[66] that when she sunbathed nude at the premises that her genitals, pubic region and buttocks were exposed to the cameras and displayed over the Internet;[67] that when she showered or bathed at the premises that her genitals, pubic region, breasts and buttocks were exposed to the cameras and displayed over the Internet;[68] that when she went to the bathroom at the premises that her genitals, pubic region and buttocks were exposed to the cameras and displayed over the Internet;[69] that on some occasions she had appeared in the chat room with her breasts, genitals, or pubic region exposed to the cameras;[70] and

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[63] Marenger deposition, page 103-108; West Deposition, page 86-87.

[64] Marenger deposition, page 103-108.

[65] Marenger deposition, page 107-108.

[66] Marenger deposition, page 104, 107.

[67] Marenger deposition, page 103, 105, 106.

[68] Marenger deposition, page 103, 105, 106.

[69] Marenger deposition, page 104, 106 and 107.

[70] Marenger deposition, page 103, 104 and 106.

that when she changed her clothes at the premises that her genitals, pubic region, breasts and buttocks were exposed to the cameras and displayed over the Internet.[71] (See pages 103 through 108 of deposition testimony of Plaintiff, Autumn Marenger.)

40. Detective Dale DeBlock, Jr., of the Tampa Police Department, is a subscriber to voyeurdorm.com and he personally observed on voyeurdorm.com the display of uncovered breasts, uncovered buttocks and/or uncovered pubic regions relative to the activities that were occurring on the premises.[72]

41. Some women employed at the premises engaged in masturbation at the premises on camera; and that activity was intended to be displayed to the subscribers of voyeurdorm.com.[73]

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[71] Marenger deposition, page 103-104.

[72] DeBlock deposition, page 56-64.

[73] Freudigman deposition, page 133-148, 335-336, 341; West deposition, page 62-71. Ms. Freudigman affirmatively acknowledged that masturbation occurred at the premises with some frequency and regularity (Freudigman deposition at page 193, 341); that during the course of chatting with subscribers that she sometimes masturbated on camera and that activity was intended to be displayed to subscribers of voyeurdorm.com (Freudigman deposition at pages 335-336); that she understood from the subscribers that the subscribers watched her masturbate on camera (Freudigman deposition at page 146); that she observed several other employees at the premises masturbate on camera (Freudigman deposition at pages 134-145); and that when she masturbated on camera at the premises that she did so to entertain the subscribers of voyeurdorm.com (Freudigman deposition, page 342). Ms. West also affirmatively acknowledged that during the course of

42. Some women employed at the premises engaged in oral sex at the premises on camera; and that activity was displayed on voyeurdorm.com.[74]

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chatting that she sometimes masturbated on camera and that activity was intended to be displayed to subscribers of voyeurdorm.com (West deposition at page 62); and that 15% of her time on chat was spent masturbating (West deposition at page 65.) Ms. West further testified that she understood subscribers were entertained when she masturbated on camera at the premises. (West deposition at pages 69-71.)

[74] Ms. Freudigman testified that she personally observed the oral sex on voyeurdorm.com (Freudigman deposition at pages 118-120, 281). Ms. Freudigman testified, moreover, that she understood the term oral sex to mean "where two people use their mouths, place their mouths on their partner's genitals for sexual pleasure." (Freudigman deposition at page 118). Ashley West also testified that she personally observed the oral sex on voyeurdorm.com (West deposition at page 101-104). Ashley West further testified that she personally engaged in oral sex on camera, at the premises, on several occasions. (West deposition, pages 94, 102, 103, 104, 105.) Specifically, Ms. West engaged in oral sex with a man, on camera, on three or four occasions; and she also engaged in oral sex with a couple of women, on camera, at the premises. (West deposition, pages 94, 102, 103, 104 and 105.) Ms. West further testified that "oral sex is . . . someone else putting their . . . mouth and tongue against my pubic region or me doing it to someone else visa versa." (West deposition at page 93.) Dena Wright also testified that oral sex occurred on camera and was displayed on voyeurdorm.com (Wright deposition at pages 115-119). Ms. Wright also acknowledged that oral sex involves one human being placing his or her mouth or tongue on another human being's genital or pubic region relative to sexual pleasure or stimulation. (Wright deposition at page 115.) Finally, Ms. Wright testified that she had oral sex with five different women at the premises; that she engaged in oral sex with one of those women on *20 different occasions* at the premises; and that, with only one exception, the acts of oral sex occurred on camera, at the premises, and were

43. The Zoning Coordinator testified that the facts which are described in paragraphs 30-39, *supra*, and 41-42, *supra*, supported her determination that there was an adult use occurring at the premises.[75]

44. Some of the theme parties and special events that occurred at the premises are on videotapes which Plaintiffs produced to the City and which were marked as exhibits at depositions. Specifically, deposition exhibit #16 is a videotape of a body painting party that occurred at the premises; deposition exhibit 17 is a videotape of a "human sundae party" that occurred at the premises; deposition exhibit #19 is a videotape of a Victoria Secret party that occurred on the premises; and deposition exhibit #20 is a videotape of a taffy party that occurred on the premises. These videotapes, which were produced by Plaintiffs to the City, and which were filmed on the premises, speak for themselves and are the best evidence of their contents.[76]

45. The theme parties and special events were transmitted live to the subscribers and were also repeated a number of times for subscribers. In that regard, a former employee at the premises (who also served as the activities director for the theme parties and special events) testified that theme parties and special events were transmitted live and were replayed on a number of occasions for subscribers; and that she personally observed the

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displayed on voyeurdorm.com (Wright deposition, pages 115-119.)

[75] See Moreda deposition, pages 126-136.

[76] See City's Second Request for Admissions; and Plaintiffs' Response thereto, paragraph 1(b).

theme parties and special events on voyeurdorm.com.[77] The house mother, Dena Wright, also testified, that subscribers could see any of the theme parties and special events on the surprise cam which played 24 hours per day, 7 days a week.[78] In addition, other employees at the premises have also testified that theme parties were played live and were also replayed for the subscribers of voyeurdorm. (See West deposition, pages 72-83; Martin deposition pages 83-84; Wright deposition, pages 92-93; Freudigman deposition, pages 228-247.)

46. Plaintiffs' counsel himself stated on the record, at the deposition of Plaintiff Autumn Marenger, that "I am entirely willing to stipulate that the contents of this video, which has been identified as . . . exhibit #16 . . . contains entertainment featuring or in any way including specified sexual activities . . . or entertainment featuring the displaying or depicting of specified anatomical areas as defined in Chapter 27."[79]

47. The voyeurdorm.com web pages have, on one or more occasions, advertised or described the Voyeur Dorm with the following language:

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[77] Freudigman deposition, page 228, 229, 231, 232, 237, 239, 240, 242, 247. Ms. Freudigman served as the activities director between June, 1999 and September, 1999. (Freudigman deposition, pages 304-305, 404.)

[78] See Wright deposition, page 92-93.

[79] This comment by Plaintiffs' counsel occurred at the deposition of Plaintiff Autumn Marenger, taken on April 20, 2000, while deposition exhibit #16 was being shown at the deposition. (See Marenger deposition, page 339-340.) (Deposition #16 is a videotape of a body painting party that took place at the premises.)

(a) Peer into The Private Lives of Seven Real College Coeds. They Live in Voyeur Dorm. Their Lives Are On Camera 24 Hours A Day. You Choose The View From 26 Hidden Cameras. Enter Their Bedrooms When They Sleep. Spy On Them in Their Bathrooms. Nothing is Of Limits. There Are No Taboos. The Girls of Voyeur Dorm Are Fresh, Naturally Erotic And As Young As 18. Catch Them in The Most Intimate Acts of Youthful Indiscretion. Want To Find Out More? Meet Them In Live Chat Sessions. Their Privacy Is Your Pleasure. Voyeur Dorm. New Secrets Are Bared Every Day.[80]

(b) As A Member Of Our Voyeur Family You Immediately Receive Complete, 24-Hour Access To Every Camera In Our House. We Don't Mind If You Watch Us Shower, Work Out, Nude Sunbathe, Change Our Clothes, Take Bubble Baths, Party With Our Friends, Sleep, Watch TV, Study (Ugh!) And Answer Nature's Occasional Calls In The Bathroom. We Never Know What's Going To Happen. Voyeur Dorm is All About Girls Being Girls. Join Now. We Can't Help It If You Catch Us With Our Panties Down.[81]

(c) We would like to invite everybody to come share our young Lives with us. This is the first Live Voyeur Web Site of this kind and we are very proud and excited to be chose to be part of it. Voyeur Dorm Has Eight Sexy Young College Girls Living Live On Camera 24 hrs A Day. We have Live Hidden Cameras in Every Room in

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[80] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(a).

[81] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(b).

Our House. With A Total of 30 Live Hidden Cameras Around the House There is A View That Will Surely Please Everyone. As A Member of Our Voyeur Family You Will Be Granted Full Access To Every Camera In our House. We like to call this a 24 Hour live Interactive TV show with some Sexy Nudity. Come Spy on Us as we Eat, Cook, Shower, Clean, Study, Change our Clothes, Workout, Sunbathe Nude, Do our makeup, Date our Boys, Take Bubble Baths, And Watch TV, And Even Sleep.[82]

(d) With 30 Live Cameras To Choose From You'll Never Be Left Without a Sexy View. I Especially Enjoy Sunbathing In The Nude As Often As Possible, Come Check Me Out. My Name is Lily.[83]

(e) I think it is sexy and erotic knowing your watching me. We were the first to put Night Vision Cams in our Bedrooms and will be adding more special cameras soon. Girls have wet dreams too. I think it's sexy and erotic knowing you're watching me when I sleep. Will you tell me if my fingers are naughty when I'm having an X-rated dream? Come watch me Sleep!![84]

(f) This is the first live college dorm site ever. Our experiment in real Voyeurism is making history. We're too young to follow rules, so

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[82] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(c).

[83] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(d).

[84] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(e).

we're doing our own. Is it wrong to share our youthful innocence with the world? Please don't judge us until you've seen for yourself. I'm not ashamed to show you my body. Are you embarrassed to watch? Don't be. Become a member and join the fun.[85]

(g) In our chat room we get lots of cool suggestions for fun things to do. Last week some guy from New York suggested Drunk Twister . . . Well it sounded like Fun. Hearing from you – even your freakiest thoughts – makes our day. Join Now[86]

(h) I'm Kim, and I just moved in to the dorm last October. I'm sort of nervous, being new and all. Is it weird that I kind of dig taking my clothes off in front of the shower cam? I'm compulsive about chatting on the internet. I hope you'll talk to me and let me know how I'm doing.[87]

(i) We Are Not Strippers, Or Dancers. We Are Seven Young College Girls Who Want To Share Our Most Intimate Secrets With The Entire World.[88]

(j) Hi my name is Tiffany I'm 22 and love to cook for all my sexy girlfriends. I especially love it when young Brandi helps me. . . . she loves

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[85] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(f).

[86] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(g).

[87] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(h).

[88] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(i).

> walking around the house Naked!! I hope she's not a lez. I don't know if I could stop myself. Join Now[89]
>
> (k) Remember we are LIVE 7 days a week, 24 HOURS a day, all YEAR long, you never know what you might catch us doing!! Join me Kim Now.[90]
>
> (l) We have lots of Fun and Sexy events that we do live on the Internet for our Viewers. One of our favorite things is Chick Night that's when we sit around in our Sexy Lingerie and drink wine and talk about boys and sex and what we want for Christmas. Have you ever wondered what chicks do when we're really alone? Betcha can't guess what happened last week. We'll never live that down. Join Now.[91]

(Emphasis in original.)

48. The voyeurdorm.com web pages that have been produced by Plaintiffs to the City – and which are marked as deposition exhibit 84 – provide, in general terms, that:

> (a) You must be 18 years old or older to view this site.[92]

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[89] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(j).

[90] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(k).

[91] See City's First Request for Admission and Plaintiffs' response thereto, paragraph 24(l).

[92] See deposition exhibit #84, page 1.

(b) The material Voyeur Dorm presents is of an explicit, sexual nature.[93]

(c) Subscribers can spy on the women as they eat, cook, shower, clean, study, change their clothes, work out, sun bathe nude, do their makeup, date their boys, take bubble baths and watch TV and even sleep.[94]

(d) The site is an adult oriented site.[95]

49. According to other voyeurdorm.com web pages produced by the Plaintiffs to the City, marked as deposition exhibit 48, the voyeurdorm.com web pages state, inter alia, that:

(a) When you join us you will immediately receive complete 24 hour access to every camera in our house. You can watch us shower, sleep, take bubble baths, get ready to go out, party with our friends, work out, study (Ugh!) and hang out with our girlfriends for chick time.[96]

(b) As a member of our Voyeur family you will be granted to every camera in our house. We like to call this a **24 hour live interactive TV show with some sexy nudity**. Come spy on us as we eat, cook, shower, clean, study, change our clothes, work out, sun bathe nude, do our makeup, date our boys, take bubble baths, and watch TV and even sleep.[97] (Emphasis in original.)

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[93] See deposition exhibit #84, page 3.

[94] See deposition exhibit #84, page 6.

[95] See deposition exhibit #84, page 47 and 49.

[96] See deposition exhibit #48, web page 1.

[97] See deposition exhibit #48, web page 3.

50. More than five individuals – that are not related by blood, marriage or adoption – have resided on, and been employed on, the premises at the same time.[98]

51. According to Mr. Hammil, and the women employed at the premises, there are approximately 40 cameras located on the premises.[99]

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[98] According to the deposition testimony of the Plaintiffs and their employees, more than 5 employees have resided at the premises at the same time. (See Marenger deposition, page 9-11; Hammil deposition, page 185-186; Freudigman deposition, page 393.) Plaintiff Marenger testified that, including herself, there were eight women living on the premises at the same time (Marenger deposition pages 9-11); and that during the time that she lived on the premises that only two employees had been related to each other by blood, marriage or adoption and that those two individuals did not live on the premises at the same time (Marenger deposition, page 115.) Mr. Hammil testified that there were eight women living on the premises in December of 1998 or January of 1999 and that none of those women were related to each other (Hammil deposition, pages 207-208). Mr. Hammil further testified that, to the extent that any employees at the premises may have ever been related, they lived on the premises at different times. (Hammil deposition, pages 211-212.) Ms. Freudigman similarly testified that – including herself – six to eight women lived on the premises and that, to the best of her knowledge, none of the women were related by blood, marriage or adoption. (Freudigman deposition, page 393.) Finally, the voyeurdorm.com web pages which have been produced by Plaintiffs to the City expressly reflect that six or more women lived on the premises. (See deposition exhibit #48, at web pages #1 and 2; and deposition exhibit #84 at web page #2.)

[99] See Hammil deposition, pages 147, 195; Freudigman deposition, page 210; West deposition, page 162; Wright deposition, page 162; Wright deposition, page 146; Martin deposition, page 176-182; Marenger deposition page 504. See

52. The cameras at the premises have been located in bedrooms, bathrooms, showers, the living room, the dining room, the kitchen, the tanning room, the gym, patio and pool.[100] The cameras have been set up to attempt to capture or track the activities in each of these rooms and areas where the cameras are located.[101]

53. There are night vision cameras on the premises.[102]

54. The number of subscribers to voyeurdorm.com increased from approximately 5,000, in its inception in 1998, to approximately 30,000 in January, 2000.[103]

55. David Marshlack is currently the President of Entertainment Network, Inc.,[104] and Charles Bruce Hammil is currently the Vice-President of Entertainment Network, Inc.[105]

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also deposition exhibits #55, 74, 90 which were prepared by deponents who had been employed at the premises.

[100] *Id.* See deposition exhibits #55, 74, 90 which were prepared by deponents who had been employed at the premises.

[101] See Freudigman deposition, pages 72, 86, 157, 170, 171; Hammil deposition, page 152-153; Marenger deposition, pages 19-23; West deposition, page 162; Wright deposition, page 145.

[102] See Hammil deposition, page 189.

[103] See Hammil deposition, page 131-132.

[104] See Hammil deposition, page 65.

[105] See Hammil deposition, page 8.

56. David Marshlack, Charles Bruce Hammil and Dan Marshlack are equal shareholders in Entertainment Network, Inc., Voyeur Dorm, L.C. and 2D&H, Inc.[106]

57. Entertainment Network, Inc. is a leading supplier of adult material for the Internet.[107]

58. Mr. Hammil is one of the founders and co-owners of the Voyeur Dorm.[108]

59. The majority of the women who have been employed on the premises, and have appeared on voyeurdorm.com, have not attended college while employed at the premises.[109]

60. Entertainment Network, Inc. is currently in the process of negotiating with several movie producers to produce a movie relative to the Voyeur Dorm which will include the subject matter of this litigation.[110]

61. The controversy surrounding this lawsuit has "sweetened the pot" relative to the movie which is being negotiated.[111]

62. The controversy surrounding the litigation has been a publicity bonanza to Plaintiffs.[112]

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[106] See Hammil deposition, page 18.

[107] See Hammil deposition, page 153.

[108] See Hammil deposition, page 10-11.

[109] See Hammil deposition, page 266; West deposition, page 122.

[110] See Hammil deposition, page 135-145.

[111] See Hammil deposition, page 140.

[112] See Hammil deposition, page 180-181.

63. The Voyeur Dorm has been the subject of media coverage including coverage on ABC, NBC, MSNBC, CNBC, CBS, FOX, Geraldo, Roseanne, Kathy Fountain, 20/20, Hardcopy, Extra, Howard Stern, Good Morning America, Jenny Jones, Inside Edition, Philly After Midnight, Leeza, Internight with John Gibson, local Channel 9, local Channel 7, local Channel 11, local Channel 14, Hanity & Colmes, Full Nelson, Today Show, Pros and Cons, as well as TV shows in Japan (TV Asahi) and news coverage in Germany.[113]

64. According to Mr. Hammil, on 15 to 20 occasions television crews or television reporters have come to the premises[114] and, in addition, newspaper writers have come out to the premises on approximately 15 occasions.[115]

65. According to Plaintiff Autumn Marenger, ABC, NBC, CBS, Bay News 9 and FOX have each visited the premises approximately five times each; there were approximately 20 different occasions when the media visited the premises when she was present; and typically there was a reporter and a camera person present in connection with the visits by the media.[116]

66. According to Ashley West, a former employee at the premises, she was interviewed at the premises approximately 30 times by the media. (West deposition, page 150-154.)

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[113] See Hammil deposition, page 249-256.

[114] See Hammil deposition, page 250-256.

[115] See Hammil deposition, page 259.

[116] See Marenger deposition, pages 176-179, 578.

67. The media representatives that have visited the premises have been given passwords to voyeurdorm.com.[117]

68. According to Plaintiffs' Rule 26(a)(1)(C) Disclosure, "the only element of damages being sought by Plaintiffs at this time is for the abstract value of constitutional rights which Plaintiffs allege have been violated by Defendants."[118]

69. All documents produced by Plaintiffs, pursuant to the Court's Order of April 19, 2000, are genuine.[119]

70. Detective DeBlock of the Tampa Police Department, pursuant to conducting an official investigation in this matter, has learned that complaints have been made relative to the activities at the premises. The nature of these complaints are identified by Detective BeBlock in his deposition. (See DeBlock deposition at pages 8, 9, 12, 13, 14, 15, 16, 17, 24, 25, 40, 41. These complaints are also identified by the Zoning Coordinator in the City's Response to Plaintiffs' First Set of Interrogatories, paragraph 15.)

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[117] See Hammil deposition, page 263-264.

[118] Plaintiffs' Rule 26(a)(1)(C) Disclosure was served on the City on January 26, 2000.

[119] On May 10, 2000 the City served its Fourth Request for Admissions upon Plaintiffs' counsel wherein the City requested Plaintiffs to admit the allegation that "all documents produced by Plaintiffs pursuant to the Court's Order of April 19, 2000 are genuine." Plaintiffs' counsel never filed a response thereto and, accordingly, the request has been deemed admitted.

71. The videotape produced by Plaintiffs, which is marked as deposition exhibit 36 ("Inside Edition"), identifies a neighbor by the name of Anthony Garcia who complains about the activities at the premises. In that regard, Mr. Garcia states "I want them out of the neighborhood." (See also City's Answers to Plaintiffs' First Set of Interrogatories, paragraph 15.)

72. The videotape produced by Plaintiffs, which is marked as deposition exhibit 25 ("Geraldo"), identifies two neighbors – a man and a woman – who also articulate concerns relative to the activities at the premises. In that regard, the woman states words to the effect that "I think it's sickening;" and the man acknowledges that it is most definitely an adult business. (See also City's Answers to Plaintiffs' First Set of Interrogatories, paragraph 15.)

73. The videotape produced by Plaintiffs, which is marked as deposition exhibit 41-2 ("MSNBC" Internight with John Gibson"), identifies a neighbor by the name of Gail Martinez who can be seen complaining about the activities on the premises. She states, among other things, that she doesn't like it; that she has a child who is underage; and that she is scared. (See also City's Answers to Plaintiffs' First Set of Interrogatories, paragraph 15.)

74. According to the Employee Handbook for the Voyeur Dorm, which was produced by Plaintiffs to the City, it states that friends should park in back if room permits or at the doctor's office;[120] and, according to the

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[120] See page 7 of the Voyeur Dorm Employee Handbook which was marked as deposition exhibit #49.

deposition testimony of Mr. Hammil, he never asked the doctor or his staff whether it was permissible for the employees of the Voyeur Dorm – or the friends of the employees – to park their vehicles at the doctor's office. (See Hammil deposition, page 227.)

75. A former employee of the Voyeur Dorm (who has been identified by the Plaintiffs as Tori),[121] appears on a videotape, produced by Plaintiffs, and this former employee makes complaints to the effect that the women at the Voyeur Dorm were "all being exploited;" and "all encouraged to take their clothes off." This videotape is marked as deposition exhibit #23 and is a tape from the Kathy Fountain show.

76. There is an Incident Report prepared by the Tampa Police Department reflecting an alleged battery that occurred at the premises on January 24, 1999.[122]

77. Plaintiffs' experts, in preparing their written reports, did not review any of the deposition transcripts in this matter. (Fisher deposition, page 10; Danner deposition, page 26; Schauseil deposition, page 12.)

78. Plaintiffs' experts, in preparing their written reports, did not review any of the videotapes of the depositions taken in this matter. (Fisher deposition, page 10; Danner deposition, page 26-27; Schauseil deposition, page 14.)

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[121] At Mr. Hammil's deposition, he identified this former employee as Tori. (See Hammil deposition, page 267-276.)

[122] This police report is identified as Report #99-06378 and has previously been produced to Plaintiffs.

79. Plaintiffs' experts, in preparing their written reports, did not review any of the deposition exhibits in this matter. (Fisher deposition, pages 10-11; Danner deposition, page 26; Schauseil deposition, page 14.)

80. Plaintiffs' experts, in preparing their written reports, did not review the City's Response to Plaintiffs' First Set of Interrogatories. (Fisher deposition, page 11-12; Danner deposition, page 27; Schauseil deposition, page 14.)

81. Plaintiffs' experts, in preparing their written reports, did not review the City's Response to Plaintiffs' First Request for Admissions. (Fisher deposition, page 12; Danner deposition, p 28-29; Schauseil deposition, page 15.)

82. Plaintiffs' experts, in preparing their written reports, did not interview any of the subscribers to voyeurdorm.com. (Danner deposition, page 29; Schauseil deposition, page 15.)

83. Plaintiffs' experts, in preparing their written reports, did not interview any of the neighbors. (Danner deposition, page 29; Schauseil deposition, page 15.)

84. Plaintiffs' experts, in preparing their written reports, were unaware of complaints that had been made about the activities at the premises and did not interview any individuals that made such complaints. (Fisher deposition, pages 68-75; Danner deposition, page 29; Schauseil deposition, page 50-57.)

85. Plaintiffs' experts, in preparing their written reports, did not consider the Supreme Court's decision in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

(This document was received and filed by Tampa City Council and is marked as deposition exhibit $167.) (Fisher deposition, page 181; Danner deposition, page 266; Schauseil deposition, page 199-200.)

86. Plaintiffs' experts, in preparing their written reports, did not consider this Court's Order dated February 5, 1996 in *Specialty Malls of Tampa v. City of Tampa*, 916 F.Supp. 1222 (M.D. Fla. 1996). (A copy of this Order was marked as deposition exhibit #164.) (Fisher deposition, page 172; Danner deposition, page 274; Schauseil deposition, page 200.)

87. Plaintiffs' experts, in preparing their written reports, did not consider this Court's Order dated November 13, 1994 in *Specialty Malls of Tampa, supra*. (A copy of this Order was marked as deposition exhibit #165.) (Fisher deposition, page 174; Danner deposition, page 274-275; Schauseil deposition, page 200.)

88. Plaintiffs' experts, in preparing their written reports, were unaware of the women's employment responsibilities as set forth in the employment agreements; and were unaware that the employees were required – pursuant to their employment obligations – to shower or bathe on camera, change their clothes on camera, tan on camera, swim on camera and participate in a variety of theme parties and special events on camera wherein employees displayed their uncovered breasts, uncovered buttocks and/or uncovered pubic regions. (Fisher deposition, pages 137-147; Danner deposition, page 188, 189, 193, 194; Schauseil deposition, page 78-84.)

89. Plaintiffs' experts, in preparing their written reports, were unaware that – according to the employment agreements – the premises were to be used as a stage and filming location for commercial Internet broadcasting 24 hours per day, seven days per week. (Danner deposition, page 232; Fisher deposition, pages 137-138; Schauseil deposition, page 68-69.)

90. Plaintiffs' experts, in preparing their written reports, were unaware that according to the employee handbook that living at the premises was to be treated as a full-time job; and that all visitors to the premises must be 18 years old or older and sign a consent form. (Fisher deposition, page 139-140; Danner deposition, pages 149, 241, 198-199; Schauseil deposition, page 94-95.)

91. Plaintiffs' experts, in preparing their written reports, were unaware that the women employed at the premises characterized themselves as Internet models. (Danner deposition, page 242; Schauseil deposition, page 86.)

92. Plaintiffs' experts, in preparing their written reports, were unaware that the women employed at the premises could be terminated at will and had expressly agreed that they were not a tenant at the premises. (Fisher deposition, pages 140-141; Danner deposition, pages 239-240; Schauseil deposition, page 77.)

93. During the period of August, 1998 to June, 2000, the Voyeur Dorm generated subscriptions and sales in the amount of $3,166,551.35. This information is reflected in a June 8, 2000 memo from Plaintiff, Entertainment Network, Inc. to Plaintiffs' counsel, Luke Lirot. (Plaintiffs'

counsel, Mr. Lirot, furnished a copy of this memo to the City.)

94. Adult uses are not permitted in a district zoned RS-60 Residential Single Family. (See Moreda deposition, page 122; see also deposition exhibit 101.)

95. Plaintiffs' expert criminologist, Dr. Danner, testified that – according to his own study – there was an 11.2% increase in calls for service to the Tampa Police Department in the area of the premises after the Voyeur Dorm began its operation at the premises. (See Danner deposition, page 221.)

96. Plaintiffs' expert criminologist, Dr. Danner, testified that the increase in calls for service to the Tampa Police Department could have been as a result of the activities occurring at the premises, or it may not have been, and that he was not in a position to definitively rule out the possibility that the activities at the premises caused the increase in calls for service to the Tampa Police Department. (Danner deposition page 222.)

97. Plaintiffs' expert criminologist, Dr. Danner, testified that college age students cause crime and that "every time you put six or more of them in a place, you are going to have problems because they are at the age of risk when they do things that create problems." (Danner deposition, page 259.)

98. Plaintiffs' expert criminologist, Dr. Danner, testified that the age range of the women at the premises "is roughly college student age." (Danner deposition, page 259.)

99. The voyeurdorm.com web pages, which have been produced by the Plaintiffs to the City, further reflect that there are six or more women at the premises and that their age range is 18-22. (See deposition exhibit #48, at web page #1 and #2; and deposition exhibit #84, at web page #2.)

Respectfully submitted,

JAMES D. PALERMO
CITY ATTORNEY, CITY OF TAMPA

By /s/ Jerry Gewirtz
Jerry M. Gewirtz,
Trial Counsel
Assistant City Attorney
Florida Bar No. 0843865
5th Floor, City Hall
315 E. Kennedy Boulevard
Tampa, Florida 33602
813/274-8996
Attorney for Defendant
City of Tampa

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery on this 31st day of July, 2000, to Luke Charles Lirot, Esquire

and Mark Dolan, Esquire, 112 East Street, Suite B, Tampa, FL 33602.

/s/ Jerry Gewirtz
Jerry M. Gewirtz
Assistant City Attorney
